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Bank holding company regulation in Kenya, Nigeria and South Africa: a comparative inventory and a call for Pan-African regulation

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Abstract This article provides an overview of the regulation of bank holding companies in three African jurisdictions (Kenya, Nigeria and South Africa), from a comparative legal perspective (with the EU and US), identifying regulation of a banking group's parent on the basis of ten identified elements of bank holding company regulation. It reveals that, while the regulation in these African jurisdictions is advanced and often consistent, there are differences. These differences not only increase the costs and reduce the efficiency and effectiveness of banking groups operating across borders in Africa but they also complicate the work of national supervisory authorities that seek to monitor and contain the risks to the safety and soundness of the financial system. These adverse consequences lead us to recommend the building of a harmonised Pan-African regulatory environment, drawing upon the commonalities that already exist, as we believe that this would contribute to the sustainable development and well being of Africa as a whole.

Keywords Africa · Kenya, Nigeria, South Africa · Bank holding companies · Comparative regulation and supervision · Pan-African regulation · EU and US BHC regulation

Introduction

Banking business is often undertaken in the form of corporate structures that entail a top-down management of enterprises that span several jurisdictions and extend into varied fields of financial services (deposit taking, lending, payments services, corporate banking), often beyond the realm of "banking" proper (including insurance, securities trading, private equity, investment management and information technology). The top-level entity may not itself be a bank. The extent of regulation over such a bank holding company is the subject of this article. We focus our research on bank holding company regulation in three African jurisdictions and compare it with the broad lines of such regulation in the United States of America (USA) and the European Union (EU), notably the Euro Area (EA).

When we speak of regulation, we mean: micro-prudential regulation, i.e. the regulation with a view to the soundness and safety of individual banks. Systemic stability, which is the concern of macro-prudential regulation and supervision, is only touched upon in the context of its older sibling, the oversight of banks instituted in the interests of depositors. We will also refrain from discussing conduct-of-business regulation, namely the public authorities' oversight, in the interest of the protection of retail consumers, of the financial products that banks and other financial services provide to the market.

Our interest in the subject has two sources: in our diverse academic and professional practices, the issue of the scope of banking regulation surfaces at times, with the contours of the exact powers granted to the micro-prudential supervisor being not always clear. This contribution explores the extent of such powers. Also, in the course of a recent assignment for a client, we found that some African jurisdictions (e.g. Kenya, Nigeria and South Africa) have latterly adopted far-reaching regulation with respect to "non-operating" bank holding companies, that is: entities that head a banking concern but do not, themselves, qualify as a bank (referred to in this article as "bank holding companies" or "BHCs"). A global comparison with the

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situation in two major jurisdictions with older traditions of BHC regulation, namely the USA and the EU, helps to put these African regulations in perspective.

We offer our findings on BHC *regulation* which we distinguish from *supervision* proper. Regulation stands for the legal norms adopted in respect of the supervision of entities, whereas supervision refers to the actual task of applying these regulations, overseeing BHCs and ensuring their compliance with the adopted BHC rules. Since we are not experts in the individual jurisdictions we studied, our findings cannot be taken as formal interpretations of the laws of Kenya, Nigeria or South Africa. While offering interpretations of EU and US law, the reader should be aware that case law and legal writing in these complex areas is surprisingly limited, so that we make our own assessment as to the proper reading of the law. Indeed, the absence of recent published research on BHC regulation has been a motive for writing the present contribution. Also, we describe, and compare, BHC regulation based on desk-top research and as we find it online, and do not include the actual practice of supervisors in this contribution.

Research framework

In assessing the extent of BHC regulation, we have taken as a point of departure a number of items that we consider are the most widely applied issues of micro-prudential concern, which, in many jurisdictions, are also applied to the licensed banking subsidiaries of a holding company. We chose these items, through an iterative process, based on our knowledge and experience of the laws and regulations governing BHCs in the USA and Europe and our research of recent laws and regulations affecting BHCs in three important African jurisdictions, namely Kenya, Nigeria and South Africa. This led us to conclude that sound BHC regulation and supervision should encompass the following main topics:

1. Licensing: corporate structure and authorisation of the BHC and authorised kinds of business for the holding company.
2. Suitability (fit and proper testing) of the BHC's shareholders and corporate governance requirements for the BHC itself.
3. Fit and proper testing as to the expertise and trustworthiness of directors of the BHC and its senior management.
4. Capital requirements for the BHC and the group at large.
5. Liquidity requirements for the BHC and the group at large.
6. Regulations imposed on the BHC and group members on exposures, intra-group financing and transactions, and stress testing.
7. Group recovery & resolution regulations applying to the BHC, over and above those applying to its banking subsidiaries.
8. Information and reporting requirements for BHCs vis-à-vis supervisory authorities.
9. Public disclosure requirements for BHCs.
10. Other rules of best international practice, e.g. the application of Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) rules to the BHC and the group as a whole.

In this article, we combine the description of some of the above items for reasons of logic and brevity.

Reflections on the future: a call for Pan-African regulatory harmony

It will become apparent from a reading of this article that BHC regulation in the various African jurisdictions studied is advanced and sophisticated and is often consistent. However, there are also differences that in some cases are not justified under critical analysis. Differing regulatory and supervisory treatment of the same subject matter increases the costs, and reduces the efficiency and effectiveness, of banking groups that operate across borders in Africa. Divergent treatment also complicates the work of national supervisory authorities that are increasingly working together to monitor and contain risks to the safety and soundness of the financial system, the banks and the cross-border financial groups to which they belong.

These adverse consequences lead us to recommend that a sustained effort should now be undertaken to strengthen and build a Pan-African regulatory environment in which the regulation of BHC's could be harmonised throughout Africa. As an intermediate step, regional BHC regulatory regimes could be developed, as we are aware they are emerging in West and Southern Africa, as we discuss succinctly in section "African regional developments". Given the commonalities that already exist, at least in the jurisdictions that we have studied, we do not think that this recommendation is overly ambitious. In fact, we think that existing African banking supervisory cooperation could be built upon to launch an effort to produce model draft laws or Guidelines governing BHCs drawing upon recent national, or regional, regulatory efforts. We are confident that this would strengthen, harmonise and better serve the interests of banks and their stakeholders, foremost their customers, supervisory agencies and the African financial system and thereby

contribute to the effective development and well-being of Africa as a whole.

Findings in respect of three African jurisdictions: institutional

In this section, we provide a glimpse of the institutional set-up in the three African jurisdictions. The supervisory authorities and the legal bases for regulation and supervision are briefly indicated.

Kenya

In Kenya, the Central Bank of Kenya (CBK)[1] is the licensing authority and supervisory agency in respect of banks and their holding companies. The CBK is an independent central bank.[2] Central to the study of BHC regulation are the Banks Act and the Prudential Guidelines issued by the CBK,[3] and the Central Bank of Kenya Act.[4] Beyond the Prudential Guidelines For Institutions Licensed Under The Banking Act Nos. 1-22, in their version of 2013, the Guideline on Non-Operating Holding Companies CBK/PG/24, effective 1 October 2013, is key to our subject.[5] The CBK explains its approach to prudential supervision in the *Central Bank of Kenya Risk Based Supervisory Framework*.[6] The CBK website provides easy access to all rules and regulations applied.[7]

Nigeria

The supervisory authority for banks and BHCs in Nigeria is the Central Bank of Nigeria (CBN),[8] governed by the Central Bank of Nigeria Act, 2007.[9] The Nigerian Financial Services Regulation Coordinating Committee (FSRCC) issues regulations for the financial sector at large, including arrangements for oversight of parents of banks, insurance companies, pension funds and capital markets. It brings together the CBN, the Federal Ministry of Finance and other agencies: the Nigeria Deposit Insurance Commission,[10] the (Nigerian) Securities and Exchange Commission (SEC Nigeria),[11] the National Insurance Commission (NAICOM),[12] the National Pension Commission (PenCom),[13] the Corporate Affairs Commission,[14] as well as the federal tax authorities,[15] and the two stock exchanges, namely the Nigerian Stock Exchange[16] and the Abuja Securities and Commodities Exchange Plc (ASCE).[17] The Nigerian regulation makes clear that BHCs (known as "financial holding companies") are to be supervised by the CBN, whereas the group subsidiaries are supervised by relevant financial sector supervisors.

Central to Nigerian BHC regulation are: the Banks and Other Financial Institutions Act 1991, as amended (the "BOFI Act")[18] which the CBN is charged with authority to administer,[19] and some of the many CBN guidelines,[20] notably: the Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria, *definitive* guidelines, 29 August 2014;[21] Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria, *exposure draft* guidelines, 16 April 2014;[22] Holding companies circular, 30 December 2011;[23] CBN Regulation on

[1] Swahili name: *Benki Kuu ya Kenya*. See: https://www.centralbank.go.ke/.

[2] The CBK's website states that, under Kenya's 2010 Constitution, the CBK "has the responsibility of formulating monetary policy, promoting price stability, issuing currency and performing any other functions conferred on it by an Act of Parliament", whereas the "Constitution guides that 'the Central Bank shall not be under the direction or control of any person or authority in the exercise of its powers or performance of its functions'".

[3] Prudential Guidelines for Institutions Licensed under the Banking Act, January 2013 (all effective 1 January 2013), at: https://www.centralbank.go.ke/images/docs/legislation/Prudential%20Guidelines-January%202013.pdf.

[4] The Central Bank of Kenya Act, CHAPTER 491, at: https://www.centralbank.go.ke/images/docs/legislation/CBKAct1stOct2015.pdf.

[5] The missing Prudential Guideline (No. 23) is the *Guideline on Incidental Business Activities CBK/PG/23*, also effective as of 1 October 2013. It regulates the permitted ancillary business of licensed banks.

[6] At: https://www.centralbank.go.ke/wp-content/uploads/2016/08/CBKs-Risk-Based-Supervision-Framework-May-2013-1.pdf.

[7] See: https://www.centralbank.go.ke/policy-procedures/legislation-and-guidelines/.

[8] See https://www.cbn.gov.ng/.

[9] At: http://www.cenbank.org/OUT/PUBLICATIONS/BSD/2007/CBNACT.PDF.

[10] See: http://ndic.gov.ng/.

[11] See: http://sec.gov.ng/.

[12] See: http://naicom.gov.ng/.

[13] See: http://www.pencom.gov.ng/.

[14] See: http://new.cac.gov.ng/home/.

[15] Federal Inland Revenue Service; see: http://www.firs.gov.ng/.

[16] See: http://www.nigerianstockexchange.com/.

[17] See: http://www.nigeriacomex.com/, however: website unavailable when visited.

[18] Cap. B3, Laws of the Federation of Nigeria, 2004, see: http://www.cenbank.org/OUT/PUBLICATIONS/BSD/1991/BOFIA.PDF.

[19] As explained at the CBN website: https://www.cbn.gov.ng/AboutCBN/#.

[20] Available at: https://www.cbn.gov.ng/documents/guidelines.asp.

[21] At: https://www.cbn.gov.ng/out/2014/fprd/holdco%20regulation%20(cleaned)%20-%20final%20for%20issuance%203.pdf.

[22] At: http://www.cenbank.org/out/2014/fprd/combineddocument-holdco%20regulations%20draft%20guidelines.pdf.

[23] At: http://www.cbn.gov.ng/OUT/2011/CIRCULARS/GOV/HOLDCO%20CIRCULAR.PDF.

the Scope of Banking Activities & Ancillary Matters, No 3, 2010, effective 15 November 2010.[24]

South Africa

The Registrar of Banks (Registrar), an official of the South African Reserve Bank (SARB),[25] and the Minister of Finance are responsible for prudential supervision of banks and for the oversight of BHCs. South Africa is on its way to new supervisory architecture (twin peaks model) which we will not discuss, even though the subject is most topical.[26] The legal basis for regulation can be found in the Banks Act No. 94 of 1990, as amended.[27] Extensive regulations issued by the Minister of Finance and published in the Government Gazette/*Staatskoerant* and directives, circulars and guidance notices issued by the Registrar complete the set of rules applying to banks and BHCs. We base our findings on the Banking Regulations published in the Government Gazette of 12 December 2012, and subsequent regulations available on the website of the SARB, including those published on 20 May 2016.[28] Additionally, we made use of documents resulting from the recent IMF Financial Sector Assessment Programme (FSAP)'s assessment of South Africa's compliance with the Basel Core Principles (BCPs)[29] and other international standards and best practices.[30]

BHC shareholder thresholds requiring approvals in Kenya, Nigeria and South Africa

Before discussing the precise regulations that apply to BHC's in each jurisdiction, it may be helpful to mention that different shareholding thresholds are employed in determining whether regulatory approvals are required in a BHC. In Kenya, a BHC needs approval for its control of a bank when it owns more than 25% of a bank, or exercises equivalent control, although a shareholder at or below the 25% mark needs CBK approval as a "significant shareholder" in a bank if it holds a 5% stake or more.[31] In Nigeria, control is considered to exist as of over 50% but, as in Kenya, shareholders in a BHC need Central Bank approval even for a 5% stake or more in the holding company.[32] Like in Nigeria, in South Africa, a BHC is considered a "controlling company" when it owns more than 50% of a bank or exercises equivalent control but, unlike in the West and East African jurisdictions we describe, stakes in a BHC at the higher level of more than 15% need approval.[33] The following table gives an overview of the thresholds applying.

Kenya
NOHC entity >25% in bank, "approved" control
Shareholdings below 25% need CBK approval as of 5% or more
Nigeria
FHC controls (>50%) at least two subsidiaries, including a bank
CBN needs to approve 5% or more stake
South Africa
Controlling company (>50% or power to appoint or dismiss majority of directors)
Stakes in a bank or controlling company of more than 15% need Registrar or Minister approval (and increases from 15 to 24%, from 24 to 49%, from 49 to 74%, and from 74 to 100%)
Registrar may apply for court order to reduce stake below 15% if considered to the detriment of bank or controlling company concerned, or to have voting power limited to 15%

[24] At: http://www.cenbank.org/OUT/2010/CIRCULARS/BSD/CBN%20REGULATION%20ON%20%20NEW%20BANKING%20MODEL%20%20CLEAN%20091110%20FINAL.PDF.

[25] See Articles 3-9 Banks Act 94 of 1990, as amended, which define the powers of the Registrar.

[26] See the amendments submitted to the original twin peaks bill and published by the South African Treasury on its website on 21 October 2016: Financial Sector Regulation Bill, Revised Version 21 October 2016, at: http://www.treasury.gov.za/twinpeaks/FSR%20Bill%20comparison%20of%20revisions%20with%20July%202016%20version.pdf. This South African Treasury page gives a full overview: http://www.treasury.gov.za/twinpeaks/.

[27] We made use of the latest consolidated version published jointly by the University of Pretoria and the Southern African Legal Information Institute of 29 June 2015, available at: http://www.saflii.org/za/legis/consol_act/ba199063.pdf.

[28] Effective 1 July 2016, available at: http://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/7306/Amended%20Regulations%20effective%201Jul2016.pdf.

[29] Basel Core Principles for Effective Banking Supervision (BCPs), in their current version (2012), see: http://www.bis.org/publ/bcbs129.htm.

[30] IMF Country Report 15/51 (*South Africa: Financial Sector Assessment Program-Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)-Technical Note*), available at: https://www.imf.org/external/pubs/ft/scr/2015/cr1551.pdf; IMF Country Report 15/53 (*South Africa: Financial Sector Assessment Program-Financial Safety Net, Bank Resolution, and Crisis Management Framework-Technical Note*), available at: https://www.imf.org/external/pubs/ft/scr/2015/cr1553.pdf; IMF Country Report 15/54 (*South Africa: Financial Sector Assessment Program-Stress Testing the Financial System-Technical Note*), available at: https://www.imf.org/external/pubs/ft/scr/2015/cr1554.pdf; and, notably (with most relevance for our research)

Footnote 30 continued
IMF Country Report 15/55 (*South Africa: Financial Sector Assessment Program-Detailed Assessment of Compliance on the Basel Core Principles for Effective Banking Supervision*), available at: https://www.imf.org/external/pubs/ft/scr/2015/cr1555.pdf. These reports were published on 3 March 2015.

[31] While Section 2 of the Banking Act defines a "significant shareholder" as a holder of "five per cent or more of the share capital" of a bank, Guideline 1.4.16 of the *Guideline on Non-Operating Holding Companies* CBK/PG/24 defines the same term as the holding of "more than five per cent of the share capital". In this article, we have chosen the more conservative definition..

[32] *Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria*, *definitive* guidelines, 29 August 2014, 4.1a, or a change in ownership which results in a change in control.

[33] Section 37 (1) of the Banks Act, and at specified higher increments thereafter: see Section 37 (2).

Findings in respect of three African jurisdictions: substantive

The first element: licensing and authorised kinds of business

The first element that we discern as applying to BHCs in the jurisdictions we researched is prior authorisation, not only of the bank itself, but also of the holding company, and regulations pertaining to the BHC's corporate structure and to the authorised kinds of business for the holding company.

Kenya

In Kenya, BHCs (known as Non-Operating Holding Companies, or NOHCs) are companies that have "approved control"[34] of an "institution", which is defined as meaning "a bank or financial institution or a mortgage finance company".[35] An NOHC is not, however, included in the definition of an "institution", and this poses some interesting questions that we raise in this article. Subject to some exceptions, ownership of more than 25% of a bank is prohibited unless approved by the CBK.[36] The CBK requires detailed information for the authorisation. "Control" of a bank requires prior approval of the CBK. NOHCs are restricted in their activities.

Authorisation of an NOHC The Banking Act prohibits,[37] with exceptions there specified,[38] the holding directly or indirectly, or otherwise having a beneficial interest, of more than twenty-five per cent of the share capital of any institution.[39] Shareholdings in banks of up to 25% are permitted, but "significant shareholders" (those holding 5 per cent or more) must be "fit and proper" and, where a significant shareholder is a corporate entity, the assessment of moral suitability extends to its "directors and senior officers".[40]

Although the word "control" as used within the definition of an NOHC is not specifically defined, there are definitions of that term in other CBK Guidelines that suggest the meaning that the CBK may use when giving its approval for an NOHC to "control" an institution. For example, "control" is defined[41] by the CBK's *Guideline on Consolidated Supervision CBK/PG/19* as "the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities", adding[42]: "Control is presumed to exist when the parent institution, directly or indirectly through subsidiaries, owns more than half of the voting power of an entity, unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control". A much broader definition of "control" for the purpose of the definition of an "associate" in section 2 (2) of the Banking Act is provided in section 2 (3) of that Act.

A lengthy and detailed list of information is required by CBK[43] before granting approval to an NOHC or assessing whether a person or entity is fit and proper, and the CBK applies the same criteria for authorising an NOHC as apply to banks,[44] and approvals may be subject to conditions.[45]

[34] See the definition of "non-operating holding company" in Section 2 (1) of the Banking Act.

[35] Each of these terms is defined in Section 2 (1) of the Banking Act. A "bank" is defined as "a company which carries on, or proposes to carry on, banking business in Kenya", excluding the CBK: Section 2 of the Banking Act. In summary, "banking business" is therein defined as accepting money on deposit and on current account from the public and lending or investing such money for the bank's own account.

[36] Even formation of an NOHC with the *intention* of acquiring more than 25% of a bank's paid-up share capital requires CBK prior approval: Guideline 3.1.a of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[37] Section 13 (1) of the Banking Act.

[38] The exceptions are: other Kenyan or foreign licensed institutions, governments, Kenyan state corporations and NOHCs approved by CBK.

[39] The Banking Act, in Section 2, defines an "institution" as "a bank or financial institution or a mortgage finance company". Here, we are only concerned with banks and their holding companies.

[40] Section 9A (2) of the Banking Act. See Part B of the First Schedule to the Banking Act for the *Criteria for Determining Moral Suitability of Significant Shareholders Proposed to Manage or Control Institutions*, subparagraph b whereof specifies that "(f)or the purposes of determining the moral suitability of a corporate entity, its directors and senior officers shall satisfy the criterion prescribed in paragraph (a) of Part B of this Schedule". This paragraph (a) requires that the CBK, when determining the moral suitability of shareholders, is to have regard "to the previous conduct and activities of the significant shareholder concerned in business or financial matters and, in particular, to any evidence (i) [of a conviction for (…)] fraud or any other offence of which dishonesty is an element; [and] (ii) [whether the person concerned] has contravened the provisions of any law designed for the protection of members of the public against financial loss due to the dishonesty or malpractices by persons engaged in the provision of banking, insurance, investment or other financial services".

[41] In Guideline 1.4.7 of the *Guideline on Consolidated Supervision CBK/PG/19*.

[42] In Guideline 3.2.2 of the *Guideline on Consolidated Supervision CBK/PG/19*.

[43] Listed in Guideline 3.5–3.7 of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[44] These criteria are set out in Section 4 (4) and (5) of the Banking Act and encompass "(a) the financial condition and history of the institution; (b) the character of its management; (c) the professional and moral suitability of the persons proposed to manage or control the institution; (d) the adequacy of its capital structure and earning prospects; (e) the convenience and needs of the area to be served; and (f) the public interest which will be served by the granting of the licence".

[45] Guideline 3.4 of the *Guideline on Non-Operating Holding Companies CBK/PG/24*: "The [CBK] may impose conditions on any approval, including conditions to address concerns on the competitive, financial, managerial, safety and soundness, convenience and needs, compliance or other concerns, to ensure that approval is

Limitations on authorised business of an NOHC Activities of NOHCs are limited to "holding investments in subsidiaries, holding properties used by group members; raising funds to invest in, or to provide support to, subsidiaries, raising funds to conduct its own limited activities, investing funds on behalf of the group, conducting the banking activities required for its own limited functions, and providing administrative, risk management and financial services to support the efficient operation of the group".[46] A foreign banking organisation that acquires a Kenyan bank or NOHC must be subject to "comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country".[47] This latter requirement forms part of the considerations the CBK is to take into account in any application of an NOHC authorisation; such considerations including a threat of monopoly or anti-competitive effects,[48] and assurances about the NOHC's reporting to the CBK on its activities and of intended compliance with the Banking Act and CBK regulations.[49]

The Banking Act[50] imposes a range of restrictions on advances, credits and guarantees by institutions. In particular, Section 11 prohibits (at the risk of personal liability for resulting losses[51]), among other activities, the granting, in Kenya, of: (a) any advance to any company (other than another institution[52]) in which the lender holds more than 25 per cent of the share capital; (b) unsecured advances to officers, significant shareholders or their associates; and (c) any advances (subject to exceptions) to any of an institution's (and for this purpose its NOHC's[53]) directors or persons participating in general management. The section also proscribes conducting business in a fraudulent or reckless manner.[54] All of these restrictions, as well as the CBK Prudential Guidelines, extend to NOHCs.[55] The CBK may impose other limitations on the exposures of NOHCs,[56] which, in addition, are not permitted to obtain any credit facilities against the security of their own shares or those of any of their subsidiaries.[57]

Nigeria

In Nigeria, groups with banking and non-core banking activities must separate those activities by adopting a holding company structure under companies referred to as "financial holding companies" ("FHCs") to ensure adequate ring-fencing of financial institutions. The so-called New Banking Model adopted in 2010 (ending the previously existing universal banking model) "permits banks/banking groups to retain non-core banking businesses by evolving into a non-operating Holding Company (HoldCo) structure".[58] FHCs must be licensed and supervised[59] by the CBN and are subject to minimum licensing, governance and prudential requirements. The CBN expects the FHC arrangement to "ring-fence depositors' funds from risks inherent in non-core banking businesses".[60] The FHC is to be "a source of financial

Footnote 45 continued
consistent with the relevant statutory factors and other provisions of the Banking Act".

[46] Guideline 1.4.15 of the *Guideline on Non-Operating Holding Companies CBK/PG/24,* which mirrors the description of the activities permitted to NOHCs in Section 2 of the Banking Act, as does the definition of NOHC in the *Guideline on Consolidated Supervision CBK/PG/19*, 1.4.9. However, it is interesting to note that Guideline 3.15 of the *Guideline on Non-Operating Holding Companies CBK/PG/24* expresses the activities permitted to an approved NOHC differently and, in particular, adds "advisory, financial, accounting, or information processing services" to support any company within the group of the NOHC "and … such other business or activity as may be approved by" CBK.

[47] Guideline 3.2.d of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[48] Guideline 3.2.a–b of the *Guideline on Non-Operating Holding Companies CBK/PG/24*. The NOHC is reminded to obtain approval from the Competition Authority of Kenya if needed; the CBK may weigh "the anti-competitive effects" and the establishment of an NOHC's "probable effect in meeting the needs of the public", and decide to authorize the NOHC when the former are "clearly outweighed" by the latter.

[49] Guideline 3.2.c of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[50] Section 11 (1) and (2) of the Banking Act.

[51] Section 11 (3) of the Banking Act, which also provides that an institution's officers may, in certain cases, be exonerated when they show that they have been unaware of, or have taken reasonable steps to prevent, such advances.

[52] Section 11 (1)(b) of the Banking Act.

[53] Guideline 7.0 of the *Guideline on Non-Operating Holding Companies CBK/PG/24* states that:"The provisions on the restrictions (…) set out under Section 11 (1) and 11 (2) of the Banking Act (…) extend to the non-operating holding companies".

[54] As defined in section 11 (1A) of the Banking Act.

[55] Guideline 7.0 of the *Guideline on Non-Operating Holding Companies CBK/PG/24.*

[56] Guideline 7.1 and 7.2 of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[57] Guideline 7.3 of the *Guideline on Non-Operating Holding Companies CBK/PG/24*.

[58] *Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria at* https://www.cbn.gov.ng/Out/2014/FPRD/HoldCo%20Regulation%20(Cleaned)%20-%20Final%20for%20issuance%203.pdf (hereafter *FHC Guidelines),* 1.0 (Introduction), explaining the New Banking Model. The *FHC Guidelines* provide the principal source of guidance concerning FHCs, although the CBN expects them to be read in conjunction with other relevant CBN regulations on the subject.

[59] *FHC Guidelines* 8.1.

[60] As the introduction to *FHC Guidelines* 1.0 makes clear.

strength to" its subsidiaries.[61] The activities of FHCs are restricted. These core elements of BHC regulation in Nigeria are elaborated below.

Requirements for an FHC An FHC must hold equity investments in *at least two subsidiaries*, one of which must be a bank (defined as meaning "commercial, merchant or specialized bank"[62]) and the other(s) must be in the financial services business. A "bank" is defined[63] simply as "a bank licensed under this Act". The term financial services "includes activities carried out by institutions under the purview of the CBN, SEC Nigeria (with the exception of Registrar business), NAICOM and PENCOM".[64] Neither the term "subsidiaries" nor "subsidiary" is defined in the FHC Guidelines. However, in a CBN Regulation of 2010 that introduced the New Banking Model that the FHC Guideline elaborates,[65] the term "subsidiary" is defined as meaning the same as it is in corporate legislation.[66] The relevant section states that "a company shall (…) be deemed to be a subsidiary of another company if (a) the company (i) is a member of it and controls the composition of its board of directors; or (ii) holds more than half in nominal value of its equity share capital; or (b) the first-mentioned company is subsidiary of any company which is that other's subsidiary". The FHC's "control" of its subsidiaries "is gauged by the holding of more than 50% of the voting shares of the subsidiary".[67]

Licensing of an FHC Unless already licensed by the CBN, promoters of an FHC must first obtain a license from the CBN based on extensive information relating to minimum capital, including a detailed business plan, disclosure of proposed shareholders, governance, board composition, fit and proper qualifications for investors, all directors and management, and group corporate structure.[68] Most notable is the requirement to submit a valid undertaking to have the FHC adequately capitalised and to submit to CBN supervision.[69]

The licensing of FHCs is a two-step process, involving approval in principal followed by final license. In deciding whether to issue an FHC licence, the CBN is required to assess many factors relating to the institution including, in particular: (a) availability of prescribed minimum capital; (b) a detailed business or feasibility plan, including ownership and identity of shareholders, sources of funding, identity of directors and senior managers, five-year financial projections and details of the group corporate structure; (c) a written undertaking that the FHC will be adequately capitalised and will submit to the supervisory authority of the CBN; (d) regulated foreign institutional investors must submit a "no objection" letter from their home regulator; (e) very detailed organisational structure; and (f) a lengthy list of supporting documentation.[70] The CBN will satisfy itself as to the organisational, security, infrastructural, risk management and internal control arrangements of the proposed FHC.[71]

Limitations on activities of an FHC FHCs must restrict their activities to the holding of equities in subsidiaries and to providing "broad policy direction" in limited areas.[72] An FHC or its subsidiaries may also provide shared services to its group in other areas approved by the NBC.[73] Prohibited activities of an FHC[74] include, among

[61] *FHC Guidelines* 1.0, where the CBN's expectations are spelled out explicitly: "A financial holding company shall be a source of financial strength to the subsidiaries. In serving as a source of financial strength to its subsidiaries, a financial holding company shall maintain financial flexibility and capital-raising capabilities for supporting its subsidiaries. It shall also stand ready to use available resources to augment capital funds of its subsidiaries in periods of financial stress or adversity".

[62] *FHC Guidelines 2.1. These terms are defined in section 66 of the Banks and Other Financial Institutions Act, 1991 (*hereafter the *BOFI Act).*

[63] See Section 66 of the BOFI Act.

[64] *FHC Guidelines* 9.0xv.

[65] Section 10 of the CBN *Regulation on the Scope of Banking Activities & Ancillary Matters*, No. 3, 2010.

[66] Precisely, in Section 338 of the Companies and Allied Matters Act, Cap. C20, 2004.

[67] See CBN's *holding companies circular* ("Definition and Structure of Holding Companies in Pursuance of the New Banking Model") FRP/DIR/CIR/GEN/01/024, 30 December 2011, at: http://www.cenbank.org/OUT/2011/CIRCULARS/GOV/HOLDCO%20CIRCULAR.PDF. The CBN expresses its expectation that banks wishing to offer other financial services should do so through separate subsidiaries which are held through a HoldCo structure.

[68] *FHC Guidelines* 3.1 on "grant of Approval-In-Principle (AIP)".

[69] *FHC Guidelines* 3.1.4: "A written and duly executed undertaking by the promoters that the financial holding company will be adequately capitalized for the volume and character of its business at all times, and that the financial holding company shall always submit itself to the supervisory authority of the CBN as an OFI". An "OFI" is taken to refer to an other financial institution, as governed by Part II of the *BOFI Act* (Sections 58–63), even though the definition of "other financial institution" in Section 66 does not seem to encompass an FHC.

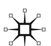
[70] *FHC Guidelines* 3.1 through 3.3.

[71] *FHC Guidelines* 9.0vii.

[72] *FHC Guidelines* 5. Human resources, risk management, internal control, compliance and other services as approved by the CBN are the permitted areas of policy direction from the FHC.

[73] *FHC Guidelines 5.3* lists Information and Communications, Facilities, Legal and other approved services. Shared services in the banking group (and other intra-group transactions) must be operated at arm's length: *FHC Guidelines 5.4 and 6.2.1.*

[74] Enumerated in *FHC Guidelines* 6.



others, investing in non-financial businesses, managing or interfering in the day-to-day activities of its subsidiaries, borrowing from the Nigerian banking system for the purpose of capitalising itself or any of its subsidiaries[75] and changes, without prior CBN approval, in ownership structure.

South Africa

In South Africa, acquiring shares or voting rights in banks (or companies that control banks) above specified thresholds[76] after waiting periods requires the written permission of the Registrar of Banks (the Registrar).[77] In addition, controlling[78] a bank (in summary, having a more than 50% interest in it, or having the power to appoint and dismiss the majority of directors) requires registration by the Registrar as a controlling company[79] subject to seven criteria. These include conformity with South African banking laws and the testing of directors and executive officers as fit and proper. Limits apply on lending by the controlling company: over 60% of its assets need to be in the banking business. More detail on South African BHC regulation follows.

Registration as a controlling company If not a bank, a "controlling company" needs to be a public company (see footnote 79). "Control" is defined[80] as, generally,[81] 50% of the voting rights in a bank or the power to appoint and dismiss the majority of its directors.[82] The ultimate parent of a bank needs to register as a controlling company at the Registrar[83] who may grant or refuse the authorisation, and make the authorisation subject to conditions.[84]

There are seven grounds for testing the application to register as a controlling company: (a) the public interest; (b) the effective exercise of control over the bank concerned; (c) that no provision of the memorandum of incorporation of the controlling company is inconsistent with the Banks Act or is undesirable in so far as it concerns banks; (d) the fit and proper nature of directors and executive officers, and their having sufficient knowledge and experience to manage the affairs of the controlling company; (e) the controlling company's financial soundness; (f) that no interest which any person has in the controlling company is inconsistent with a provision of the Banks Act; and (g) that the application complies with the requirements of the Banks Act.[85] The end of control over a bank leads to the cancellation of the registration as a controlling company.[86] In case the Registrar perceives other reasons to cancel the registration as a controlling company, he or she may approach the High Court.[87] Among the grounds for cancelling registration are that (1) the controlling company has provided the Registrar with materially false information in connection with its application for registration, and (2) non-compliance with the Banks Act. Moreover, the registration as a controlling company may be cancelled if, on grounds submitted by the Registrar, "the court is of the opinion that it is not in the public interest to allow the controlling company concerned to continue its activities as a controlling company" (see footnote 87).

Limitations on a controlling company's business The South African Banks Act contains specific limitations on

[75] In February 2015, the CBN reminded banks not to use funds borrowed from the Nigerian banking system to shore up group capital. The CBN states "(…) the requirement that funds for the (re) capitalization of financial institutions should NOT be sourced from borrowings within the banking system still subsists". The CBN ends the circular on a severe tone: "Financial institutions are advised to strictly adhere to the above, as breaches will be met with severe regulatory sanctions". See CIRCULAR BSD/DIR/GEN/LAB/08/008 of Feb 5, 2015 on the prohibition from borrowing to capitalize banks, available at: http://www.cenbank.org/Out/2015/BSD/RE-PROHIBITION%20FROM%20BORROWING%20TO%20CAPITALIZE%20BANKS.pdf; andCIRCULAR FPR/DIR/CIR/GEN/05/007 of June 23, 2015 on the redesign of the credit risk management system, available at: http://www.cenbank.org/Out/2015/FPRD/Circular%20on%20CRMS%20Redesign.PDF. Interestingly, restrictions on lending to group related persons are less strict than in other jurisdictions discussed in this Article, for example, in Kenya.

[76] The thresholds begin at 15% and are stated, in Section 37 (2) of the Banks Act, as holdings of >15–24, >24–49, >49–74, and >74. The latter two require the permission of the Minister of Finance, through the Registrar.

[77] An officer of the Reserve Bank of South Africa under Section 4 of the Banks Act.

[78] Moreover, the controller must be a "public company" within the meaning of the South African Companies Act, or a South African bank, or "an institution which has been approved by the Registrar and which conducts business similar to the business of a bank in a country other than the Republic [of South Africa]": Section 42 (1) Banks Act.

[79] Sections 43 ff. Banks Act.

[80] In section 42 (2) Banks Act.

[81] Control is assumed for a company whose subsidiary is a bank. When, due to voting right limitations, a person owning 50% of the shares cannot "decisively influence the outcome of the voting at a general meeting of the bank", he or she is considered not to be in control. If, in another situation, a person has a right to appoint the majority of directors, control is assumed. See section 42 (2)(a)–(c) Banks Act.

[82] Section 42 (2)(a–c) Banks Act.

[83] Section 43 (1) Banks Act.

[84] Section 44 (1) Banks Act.

[85] Section 44 (2) Banks Act.

[86] Section 45 Banks Act.

[87] Section 46 Banks Act.

lending by controlling companies. Section 50 sets limits on the exposure of controlling companies vis-à-vis specific companies. An implementing regulation of the Registrar[88] elaborates Section 50, setting the parameters for this exposure in relation to the controlling company's share capital. As the explanatory notes to this Registrar's Directive make clear, the limit pursuant to Section 50 of the Banks Act in respect of non-bank financial business and in respect of fixed property[89] not used for the purpose of banking business, was set at 40% of consolidated capital of the controlling company and the banks under its control. Conversely, at least 60% of the assets of a controlling company are to be used for banking business (or holding companies for banking business) and fixed property used for banking business. The rationale for such limitation is that the banking business should be the main focus of attention of the controlling company's directors and senior management. After a statutory amendment, the limitation is no longer contained in the Banks Act but in regulations adopted thereunder. The Registrar keeps the limit on non-bank business/real estate at 40%, while specifying the capital items on a reporting return to be included in the calculation and the consolidated basis for this calculation.

There are also limitations on intra-group exposure.[90] In its 2015 assessment of the South African prudential regime, the IMF recommended that the authorities should strengthen the monitoring and management of risks from non-banking activities.[91]

[88] Directive D9/2013, dated 24 June 2013.

[89] Which we understand to mean: immovable property including land, buildings and fixtures, in other words: immovable property or real estate. No definition of the term has been found.

[90] Regulation 36(16) on intra-group transactions and exposure requires banks and controlling companies to have robust arrangements in place to manage intra-group risk and permit the Registrar to take supervisory measures (including deduction of capital, demanding adequate collateral, imposing limitations to exposures) in relation to intra-group risk.

[91] While finding South Africa in compliance with Principle 12 of the Basel Core Principles on Consolidated Supervision, the IMF recommended that "the authorities should make further effort to monitor and manage risks arising from nonbanking activities or parent entities of a financial group (some of which are not bank controlling companies) to which a South African bank belongs. In this regard (…) the authorities should strengthen its technique, such as group-wide stress testing, to monitor and assess those risks. The authorities should further improve the recovery and resolution planning of large banking groups particularly once the necessary power is given to the supervisor by the expected new legislation. Such planning should also consider scenarios where shocks originate from non banking entities or parent groups". IMF Country Report 15/55 (*South Africa: Financial Sector Assessment Program-Detailed Assessment of Compliance on the Basel Core Principles for Effective Banking Supervision*), at: https://www.imf.org/external/pubs/ft/scr/2015/cr1555.pdf, published on 3 March 2015.

The second and third elements: shareholder suitability and corporate governance requirements, fit and proper directors and senior managers

Beyond their corporate structure and restrictions on authorised kinds of business, BHCs are also subject to assessment of the suitability of their shareholders and to specific corporate governance requirements, while fit & proper tests of directors and senior management apply. We will discuss these second and third elements of BHC regulation simultaneously.

Kenya

In Kenya, "significant shareholders" (holding, directly or indirectly, or otherwise having a beneficial interest of five per cent or more of a bank's share capital)[92], and even some non-significant shareholders,[93] of an institution (which includes a bank)[94] must be certified "fit and proper" by CBK.[95] Extensive corporate governance rules apply to banks and NOHCs. Where a significant shareholder is a corporate entity, the assessment of moral suitability extends to its "directors and senior officers".

Suitability of shareholders in, and directors and senior officers of, an NOHC Each bank is required to ensure that no person becomes a director (i.e. an executive or non-executive director)[96] or senior officer (broadly defined)[97]

[92] Section 2 (1) Banking Act defines "significant shareholder" as meaning "a person, other than the Government or a public entity, who holds, directly or indirectly, or otherwise has a beneficial interest amounting to, five per cent or more of the share capital of an institution", and Section 13 (4) Banking Act states: "No institution shall transfer more than five percent of its share capital to an individual or an entity except with the prior written approval of the [CBK]".

[93] Amendments to the Banking Act in 2015, extend the vetting to certain non-significant shareholders, including those who exercise, or have the capacity to exercise, direct or indirect control of a bank: see section 9A (3A) and (3B).

[94] An "institution", according to Section 2 s(1) Banking Act, "means a bank or financial institution or a mortgage finance company" whereas a "financial institution means a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act".

[95] Section 2 of the Banking Act.

[96] Directors include non-executive directors (see *Guideline on Non-Operating Holding Companies CBK/PG/24* at 1.4.6).

[97] The term "senior officer" is defined as "a person who manages or controls" an institution and specifically includes the officers listed in section 9A (8) of the Banking Act. This provision reads as follows: "For the purposes of this section and of the First Schedule, 'senior officer' means a person who manages or controls an institution licensed under the Act, and includes: (a) the chief executive officer, deputy chief executive officer, chief operating officer, chief financial officer, secretary to the board of directors, treasurer, chief internal auditor, or manager of a significant unit of an institution licensed

unless the CBK certifies the person as fit and proper to manage or control the institution.[98] The Banking Act states that the CBK shall vet a broad array of qualities of the person concerned and also assess the previous conduct and activities of the person in business and financial matters.[99] "Significant shareholders" (i.e. broadly, those holding 5% or more of shares) of an institution (e.g. a bank) must also be certified by the CBK as "fit and proper person[s] to manage and control the institution".[100] Under the Banking Act, the criteria for vetting significant shareholders, their directors and senior officers are more limited and focus on the their activities in business and financial matters, particularly whether the shareholder has been convicted, or contravened the provisions, of laws relating to fraud, dishonesty or malpractice in the provision of financial services.[101] However, the NOHC Guideline clarifies that all persons seeking to become significant shareholders or senior officers of any NOHC must complete the fit and proper forms set down in the Second Schedule to that Guideline (covering a broad array of criteria) and must be vetted as suitable persons by CBK under the criteria set out in the Banking Act.[102]

If the CBK determines and notifies a significant shareholder that it does not fulfil the fit and proper criteria, it must cease immediately to exercise its voting rights in the institution (i.e. the bank) and reduce its shareholding to below five per cent within twelve months.[103]

Corporate governance requirements for an NOHC Extensive corporate governance rules apply to banks and their shareholders including, by definition, NOHCs.[104] Acknowledging a corporation's own responsibility, the CBK has set out minimum standards which banks and their shareholders should adhere to. Grouped in fourteen principles, and including a model code of conduct and remedial measures, the standards cover, inter alia, corporate responsibilities, risk management, compliance, disclosure, integrity, compensation systems, conflicts of interest, client confidentiality and insider loans. They go into considerable detail.[105]

Although the *Prudential Guideline on Corporate Governance CBK/PG/02* is not declared applicable expressly in the NOHC Guideline, as other CBK Guidelines are, it "is intended to provide the minimum standards required from shareholders, directors, chief executive officers, management and employees of an institution"[106] and "applies to the duties, responsibilities and code of conduct for shareholders, directors, chief executive officers, management and employees of an institution".[107] Moreover, Principle 6 of the *Corporate Governance Guideline* addresses corporate governance in a group structure as follows: "In a group structure, the board of the parent company has the overall responsibility for adequate corporate governance across the group and ensuring that there are governance policies and mechanisms appropriate to the structure, business and risks of the group and its entities".[108] Therefore, we are comfortable to conclude that the principles and requirements contained in the *Corporate Governance Guideline* apply to NOHCs, as well as to banks.

No shareholder with more than five per cent shareholding in a banking institution shall be an executive director or form part of the management of the institution or institution's holding company.[109] The penalties for non-compliance[110] appear to be mandatory, as previously mentioned.

Nigeria

An FHC is required to be a body corporate registered with the Nigerian Corporate Affairs Commission as a company

Footnote 97 continued
under this Act; (b) a person with a similar level of position or responsibilities as a person described in paragraph (a)".

98 Section 9A (1) of the Banking Act and First Schedule, Part B(b).

99 The qualities and types of conduct are stated in Part A of the First Schedule of the Banking Act.

100 Section 9A (2) and (3) of the Banking Act. In certain circumstances, other shareholders may also be similarly vetted: see Section 9A (3A) of the Banking Act.

101 See Part B (a) and (b) of the First Schedule of the Banking Act. Compare the fit and proper criteria set forth in the Second Schedule of the NOHC Guideline. The latter require an applicant to answer a series of questions to address the criteria set forth in the First Schedule of the Banking Act.

102 See *Guideline on Non-Operating Holding Companies CBK/PG/24 at 3.5–3.7 and the Second Schedule. Guideline* 3.7 refers to the criteria "under the Second Schedule to the Act". In fact, the criteria are set out in the First Schedule to the Act and the Second Schedule to the Guideline.

103 Section 9A (4) of the Banking Act. This appears to be a mandatory consequence, not requiring board or shareholder decision or a prior arbitral or judicial proceeding, as is the case in South Africa. Section 9A (5) of the Banking Act adds that, if the CBK determines and notifies that a director or senior officer is no longer fit and proper, the person shall cease to hold the office. However, that Section refers to a director or senior officer of an "institution" and, as previously mentioned, an NOHC is not an "institution" as defined in the Banking Act.

104 *Guideline on Corporate Governance CBK/PG/02 (*hereafter *Corporate Governance Guideline).*

105 Including evaluation forms for the Board and its members, and prescription of how to conduct video conferencing of Board meetings.

106 See 2.1, *Corporate Governance Guideline*, emphasis added.

107 See 2.2, *Corporate Governance Guideline*, emphasis added.

108 See 3.6 of *Corporate Governance Guideline,* which also adds various specific requirements.

109 *Corporate Governance Guideline*, 3.2.2.

110 Applicable to significant shareholders as set out in Section 9A (4) of the Banking Act.

and licensed by the CBN and is regarded as non-operating where it does not engage in the day-to-day management of its subsidiaries.[111] An FHC may have only two hierarchies, a parent and an intermediate FHC, and the structure chosen is not reversible for a minimum of three years.[112]

In Nigeria, the FHC Guidelines contain a number of corporate governance provisions[113] especially designed "to strengthen the governance structure" of FHCs, including particularly that investors, and board (executive and non-executive directors) and management appointees, be fit and proper and management positions should be in line with the requirements of the CBN's Approved Persons Regime and other CBN Regulations, as well as those governing the disqualification of directors and management applicable to banks. FHCs must also comply with any code of corporate governance issued by CBN for institutions under its purview.[114]

An FHC is prohibited from appointing members of its board to the boards of its subsidiaries, and vice versa, except with prior CBN consent.[115] The Approved Persons Regime in Nigeria is designed to ensure that only "fit and proper persons" are "approved for appointment to board, top management/executive and critical operational positions in banks … and other financial institutions".[116] The CBN is required to apply fitness and proprietary tests according to many criteria, some of which are in the BOFI Act, and others in the Assessment Criteria regulations.[117] The assessments are made on a continuous basis every two years[118] and specific qualifications and experience are required for different positions.[119] Regulations on the disqualification of board and management of banks apply to FHCs.[120] As a result, no person shall be appointed or remain as a director, secretary or officer of an FHC under circumstances set forth in Section 48 of the BOFI Act which disqualifies and excludes certain individuals from the management of banks.[121] Failure to comply with regulations or guidelines issued by the CBN attracts penalties stated in Section 60 of the BOFI Act and persistent failure may be ground for licence revocation.[122] In addition, any "investor with significant shareholding of 5% and above in any Financial Institution in Nigeria" must meet the criteria set forth in the Assessment Criteria.[123]

FHCs must also comply with any code of corporate governance issued by the CBN, have competent and independent boards and comply with other corporate governance standards.[124] As a result FHCs must comply with, among others, the Code of Corporate Governance for Banks and Discount Houses in Nigeria, effective 1 October 2014.[125] This Code sets minimum standards for the operation, regulation and governance of enterprises to which it applies so as to ensure adherence to accepted ethical standards and best practices as well as formal laws. It covers a wide range of issues including: the responsibilities, size and composition of boards and board committees; remuneration policies; rights and protection of shareholders and stakeholders; risk management; disclosure, transparency and reporting; and the management of conflicts of interest. Failure to comply with the Code attracts the sanctions in section 60 of the Banks Act.

South Africa

In South Africa, shareholdings above 15% in a bank or a controlling company require prior approval by the Registrar. Incremental changes need approval and a one-year

[111] *FHC Guidelines* 2.2.

[112] *FHC Guidelines* 2.3.3 and 2.3.7.

[113] *FHC Guidelines* 4.0.

[114] *FHC Guidelines* 4.0d.i.

[115] See *FHC Guidelines* 6.4a.i and 6.4b. In addition, a cooling-off period of three years applies to executive directors aspiring to take up a non-executive director (NED) position with their "banks and subsidiaries": see *CBN Circular BDS/DIR/GEN/LAB/07/009* of March 13, 2004. It is not clear whether this is applied to an executive director aspiring to take up a NED position with a FHC in the same group.

[116] See "*Assessment Criteria for Approved Persons' Regime for Financial Institutions*", June 21, 2011 (attached to *CBN Circular FPR/DIR/GEN/01/016*) (hereafter the Assessment Criteria) 1.0.

[117] Sections 18, 19 and 48-50 of BOFI Act and the Assessment Criteria 2.0 and 3.0.

[118] Assessment Criteria 3.0.

[119] Expressly for (a) Managing Director/Deputy Managing Director/Executive Director; (b) General Manager/Deputy General Manager/Assistant General Manager; (c) Non-Executive Directors; (d) Company Secretary/Chief Legal Officer; and others. See Assessment Criteria 3.2.

[120] *FHC Guidelines* 4.0c.

[121] Including if of unsound mind, or of ill health rendering her/him incapable of carrying out her/his duties, is bankrupt or in suspension of payments, is convicted of an offence involving dishonesty or fraud, is guilty of serious misconduct, or is disqualified or suspended from practicing a profession in Nigeria requiring qualification. A director or manager of a bank wound up by the Federal High Court is barred from acting or continuing as director of a bank (specific CBN Governor exemption possible). Those who lose their job because of "fraud, dishonesty or conviction for an offence involving dishonesty or fraud shall not be employed by any bank": Section 48 (4) of the BOFI Act.

[122] Section 60 of the BOFI Act prescribes periodic penalty payments, fines, imprisonment and loss of license as the consequences of failure to comply with the conditions for licensing.

[123] Assessment Criteria 5.0. Some of these criteria would apply only to natural persons. Others could apply to corporate shareholders, but it is not known whether or how CBN applies the criteria to corporate shareholders.

[124] *FHC Guidelines* 4.0d.

[125] See *CBN Circular FPR/DIR/CIR/GEN/01/004*, dated 16 May 2014. The corporate governance of banks, for which the board and management are responsible, is a specific subject for review by the NCB under the Supervisory Review and Evaluation Process (SREP); see Guidance Notes on Supervisory Review Process, BSD/DIR/GEN/BAS/08/031/5, at: http://www.cenbank.org/Out/2015/BSD/5.Guidance%20Notes%20on%20Supervisory%20Review%20Process.pdf.

waiting period between such increases, passing thresholds of 24, 49, 75% up to 100% control. Criteria are applied to assess the suitability of shareholders including the public interest and the interest of depositors and the bank/controlling company.[126] Extensive and prescriptive corporate governance rules apply which extend to risk management processes, practices, procedures and policies, and internal control mechanisms of banks and controlling companies. In its 2015 FSAP,[127] the IMF spoke of "a very high standard of corporate governance and risk management" to which banks and controlling companies are held in South Africa.

Suitability of shareholders and directors Testing of shareholders as fit and proper was discussed above, under the first of the ten elements. The suitability of a person to be a director (i.e. executive or non-executive director[128]), or an executive officer,[129] of a bank or controlling company is to be assessed by the Registrar on the basis of the following criteria:[130] (i) general probity of the person; (ii) his or her competence and soundness of judgment relating to his or her responsibilities; and (iii) "the diligence with which the person concerned is likely to fulfil those responsibilities". The Banks Act further elaborates[131] as elements that the Registrar may take into account when assessing whether a person is fit and proper: fraud, non-compliance with financial services legislation or corporate law, insolvency, conduct that was "deceitful, prejudicial or otherwise improper (whether unlawful or not)", and association with business practices or conduct that cast doubt on his or her competence or sound judgment.[132]

The Registrar[133] may apply for a court-ordered reduction of a share or voting rights in a bank or controlling company to less than 15% if of the opinion that the control will be to the detriment of the bank or controlling company.[134]

Wide-ranging and descriptive requirements apply to banks and controlling companies in the area of corporate governance. Apart from rules emanating from corporate law (which we did not research), the Banking Regulations contain extensive prescriptions for the corporate governance, risk management processes, practices, procedures and policies, and internal control mechanisms of banks and controlling companies. In particular, the detailed regulations on these topics that are contained in Regulation 39(1)–(19), in so far as they are relevant, apply "mutatis mutandis … to any controlling company".[135]

The fourth, fifth and sixth elements: Consolidated Supervision, Capital and Liquidity Requirements for BHC and group, and exposures, intra-group financing and stress testing

Beyond requirements relating to their corporate structure and governance, BHC regulations also impose conditions on BHCs and the groups they head as regards their financial performance. Consolidated supervision is mandated and capital, liquidity, exposures, and group financing arrangements and stress testing are regulated (to varying degrees).

Kenya

In Kenya, the CBK has adopted consolidated supervision spanning entire groups.[136] NOHCs must maintain adequate

[126] Section 37 (4) Banks Act.

[127] IMF Financial Sector Assessment Programme (FSAP)'s assessment of South Africa's compliance with the Basel Core Principles (BCPs) and other international standards and best practices. See: IMF Country Report 15/55 (*South Africa: Financial Sector Assessment Program-Detailed Assessment of Compliance on the Basel Core Principles for Effective Banking Supervision*), available at: https://www.imf.org/external/pubs/ft/scr/2015/cr1555.pdf, published on 3 March 2015.

[128] The definition of "director" in Section 1 of the Banks Act "has the meaning ascribed to that word in section 1 of the Companies Act, and includes an executive director and a non-executive director, unless expressly stated otherwise".

[129] An executive officer of "a bank, includes any employee who is a director or who is in charge of a risk management function of the bank, the compliance officer, secretary of the company or any manager of the bank who is responsible, or reports, directly to the chief executive officer of the bank": section 1 of the Banks Act.

[130] Section 1A(a) Banks Act.

[131] Section 1A(b) Banks Act.

[132] See, also, Regulation 41 (*Composition of the board of directors of a bank or controlling company*). This specifies incompatibilities in respect of the Chairman of the Board of Directors of a bank or a controlling company. The Chairman of the Board of Directors of a controlling company cannot be an employee of the controlling company or of any bank held by the controlling company, or a

Footnote 132 continued
member of the audit committee of the controlling company or of any bank held by the controlling company.

[133] Or the Minister of Finance, if the shareholding or voting rights exceed 49%: see Section 37 (5)(b).

[134] Section 37 (5) of the Banks Act.

[135] Regulation 39 (*Process of corporate governance*) has been amended various times since the Regulations under the Banks Act were published on 12 December 2012 (Government Notice No. R. 1029 in *Government Gazette/Staatskoerant* No. 35950) and now covers more than 55 pages. See also Regulation 36(16)(a) and (17).

[136] As explained on its website, "CBK has adopted consolidated supervision, which entails supervising a bank as an individual as well as a member of a banking group. Where a bank has affiliates (a holding company, subsidiary, associate and other affiliates), CBK's regulatory and supervisory purview spans across the entire group of companies since risks that may affect the stability of the bank may emanate from any of the members of the group". At: https://www.centralbank.go.ke/index.php/banksupervision, which also states: "Further, CBK together with the East African Community member states and other regional Central Banks have embraced the concept of supervisory colleges as part of the supervisory framework for regional banking groups. A supervisory college is a forum of banking supervisors to share knowledge and information on regional banks. Through supervisory colleges, CBK and other regional

capital ratios prescribed by the CBK and minimum capital and liquidity requirements on a solo and consolidated basis to be a source of strength for group bank(s). Failure to comply must be notified to the CBK which may suspend or restrict the NOHC's activities or give other directions.

Consolidated supervision is defined as "an overall evaluation of an institution and the group to which it belongs, to ensure that all risk exposures are taken into account, whether the risks arise in the institution itself, or in a significant shareholder, subsidiary or associate of the institution".[137] An NOHC with a bank subsidiary "shall ensure compliance with the provisions of the Central Bank on Capital Adequacy (CBK/PG/03), Liquidity Management (CBK/PG/05), and Consolidated Supervision (CBK/PG/19) with regard to capital adequacy, large exposures, liquidity ratios and market risk exposures".[138] We take this to mean that responsibility for compliance with these requirements lies with the NOHC. This is confirmed by an explicit statement to that effect on CBK's website.[139] An NOHC's responsibility to ensure adequate levels of capital[140] is further made clear in the following rule: "Members of the banking group are required to maintain the capital adequacy ratios prescribed by their respective regulators and ensure minimum capital requirements are complied with on a solo and consolidated basis. In case of any shortfall in the capital adequacy ratio of any of the subsidiaries, the parent[141] should maintain capital in addition to its own regulatory requirements to cover the shortfall".[142] Both the NOHC and the banking subsidiary(-ies) need to maintain adequate capital, according to the Banking Act[143] and the CBK's prudential regulations.[144] Beyond risk-weighted capital adequacy, a leverage ratio may also be applied.[145] As said, non-compliance with the capital requirements must be notified to the CBK[146] which may restrict or suspend the activities of the approved NOHC, or give other directions as it sees fit.[147] We found no specific rule on multiple gearing, but the CBK's review of information provided by banking groups on their capital adequacy allows it to assess intra-group capital provisioning.

Similarly, with respect to liquidity, NOHCs must maintain adequate liquidity to be a source of strength for group bank(s). Liquidity requirements applicable to group bank(s) on a solo basis are extended to the group which are to be monitored on a consolidated basis after netting out intra-group transactions and exposures of banking institutions in the group.[148] Again, failure to comply must be notified to CBK which may suspend or restrict the NOHC's activities or give other directions.[149]

Footnote 136 continued
Central Banks are able to promote the stability of the regional banking system".

[137] *Guideline on Non-Operating Holding Companies CBK/PG/24* 1.4.4 and *Guideline on Consolidated Supervision CBK/PG/19* 1.4.5.

[138] *Guideline on Non-Operating Holding Companies CBK/PG/24* 10.1.

[139] "The aim of approving non-operating holding companies of banks is to free banks to concentrate on their core business of mobilizing deposits and advancing loans <u>and leaving the business of capital and risk management for banks in a group to the non-operating holding company.</u>" (Emphasis added).

[140] The exact levels of capital required are set out in *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.5: core capital at least equal to 8% of risked weighted assets and off-balance sheet items, and of 8% of total deposit liabilities held by the NOCH's subsidiaries, and total capital of at least 12% of risked weighted assets and off-balance sheet items. Banking institutions are required to hold a capital conservation buffer of 2.5% (8.6) and the CBK may raise the minimum capital level for an NOCH having regard to its risk profile or for other considerations (8.7). Core capital is defined in Section 2 of the Banking Act and elaborated in 1.4.2 of the *Guideline on Capital Adequacy CBK/PG/03*. See, also, minimum core capital levels expressed in Kenyan shillings in 4.1.3, which amount to Ksh 1 billion (around EUR 9 million) for banks. Criteria for higher capital ratios are non-exhaustively enumerated in 4.2 of the *Guideline on Capital Adequacy CBK/PG/03*.

[141] A "parent" is defined as "an entity that controls one or more entities": *Guideline on Consolidated Supervision CBK/PG/19* 1.4.13.

[142] *Guideline on Consolidated Supervision CBK/PG/19* 4.1.2.

[143] Section 18(2): "A non-operating holding company or any other vehicle of ownership which controls a group shall, in relation to its business, maintain adequate capital and adequate forms of liquidity to demonstrate that it is a source of strength for the institution and shall comply with any regulations issued by the Central bank on minimum ratios or capital requirements in any other form".

[144] *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.2: "An approved non-operating holding company shall be required to maintain the prescribed capital adequacy ratios. For banking entities in the group, minimum capital requirements should be complied with on a solo and consolidated basis". *Guideline of Consolidated Supervision CBK/PG/19*: "4.1.2 Members of the banking group are required to maintain the capital adequacy ratios prescribed by their respective regulators and ensure minimum capital requirements are complied with on a solo and consolidated basis. In case of any shortfall in the capital adequacy ratio of any of the subsidiaries, the parent should maintain capital in addition to its own regulatory requirements to cover the shortfall".

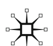
[145] Section 18 of the Banking Act and *Guideline on Capital Adequacy* CBK/PG/03.

[146] *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.3.

[147] *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.4 and 8.8. The approved NOHC is to comply with such directions. See, also, Part V of the *Guideline on Capital Adequacy CBK/PG/03* on the remedial actions the CBK may impose, which include restricting dividend pay-outs, limitations on credit operations and on deposit taking.

[148] *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.1, where it is also stated: "In respect of non-banking financial entities within bank groups, each should comply with its solo liquidity requirements as applicable".

[149] *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.3.



Single and group borrower exposure limits, including a limit of all large exposures of 500% of core capital,[150] apply on a solo and consolidated basis.[151] We could not find specific restrictions on intra-group financing other than a good governance requirement that a bank's board must understand the legal and operational risks and constraints of intra-group exposures and how they affect the group's funding, capital and risk profile[152] and that aggregate exposures to, and transactions with, related parties must be publicly disclosed.[153]

The Kenyan *Guideline on Capital Adequacy* and the *Guideline on Stress Testing*[154] require stress testing for certain types of financial institutions. However, the *Guideline on Capital Adequacy*[155] is expressly stated to have application to "[b]anks, financial institutions and mortgage finance licensed to conduct banking business in Kenya under the Banking Act"[156] and the *Guideline on Stress Testing* "applies to all institutions licensed under the Banking Act".[157] An NOHC per se does not fall within any of these types of financial institutions,[158] and therefore we conclude that no stress testing obligations explicitly apply to NOHCs.[159] This is surprising to us, since it is not consistent with the CBK's avowed intention to lay the responsibility for overall risk management and soundness of financial groups at the holding company level.[160]

Nigeria

In Nigeria, similar provisions require consolidated supervision of FHCs as a complement to solo supervision of banks. FHCs must ensure that they and all their subsidiaries are adequately capitalised at all times. The CBN may require an FHC to invest fresh capital if needed, and to divest from its banking subsidiary if the FHC is run inappropriately.

Consolidated supervision is carried out on the basis of a financial industry-wide framework.[161] In addition to the written undertaking that the FHC will be adequately capitalised (given as part of the licensing process), FHCs must have minimum paid-up capital that exceeds the sum of the minimum paid-up capital of all its wholly owned subsidiaries, or proportionate holdings in lesser owned subsidiaries. Excess capital in one subsidiary is not to be used to make up a shortfall in another subsidiary.[162] Thus, it is quite clear that the FHC is to maintain fully a capital level equal to that prescribed for its licensed subsidiaries. Furthermore, FHCs must ensure that their subsidiaries are adequately capitalised[163] and that their subsidiaries comply with the capital adequacy ratio prescribed by their sector regulators.[164] The calculation of risk-weighted bank capital[165] has been prescribed in recent (June 2015) CBN

[150] *Guideline on Prohibited Business CBK/PG/07* 3.3. Large exposures are defined, in 1.4.4 of this Guideline, as "all credit facilities granted to a person and his associates above 10% of an institution's core capital".

[151] *Guideline on Consolidated Supervision* CBK/PG/19 4.1.3.

[152] *Guideline on Corporate Governance CBK/PG/02* 3.13.1.

[153] *Guideline on Publication of Financial Statements and Other Disclosures CBK/PG/10* 3.5.

[154] *Guideline on Capital Adequacy CBK/PG/03* 4.4 and *Guideline on Stress Testing CBK/PG/20*.

[155] The *Guideline on Capital Adequacy CBK/PG/03* specifies as follows, under 4.4 (ICAAP):

"Stress testing—An institution's capital planning process should incorporate rigorous, forward-looking stress testing that identifies possible events or changes in market conditions that could adversely impact the institutions. In their ICAAPs, institutions should examine future capital resources and capital requirements under adverse scenarios. The results of forward-looking stress testing should be considered when evaluating the adequacy of an institution's capital. For further guidance on stress testing expectations, institutions should refer to *Guideline on Stress Testing (CBK/PG/20)*".

[156] *Guideline on Capital Adequacy CBK/PG/03* 1.03, as those terms are defined in the Banking Act: *Guideline on Capital Adequacy CBK/PG/03* 1.4.

[157] *Guideline on Stress Testing CBK/PG/20* 1.3, also as defined in the Banking Act: *Guideline on Stress Testing CBK/PG/20* 1.4.

[158] In particular, a NOHC is not an "institution" as defined in the Banking Act. For the definition of an NOHC, see the text at footnote 35 above.

[159] *Guideline on Non-Operating Holding Companies CBK/PG/24* 10.1 does not include the stress testing Guideline in the prudential guidelines an NOHC should ensure compliance with.

[160] It may be that the CBK could direct an NOHC to perform stress testing, e.g. if it was failing to comply with other regulatory requirements, for example, capital adequacy or liquidity requirements.

[161] A Framework for Consolidated Supervision of Financial Institutions in Nigeria and related Guidelines, were issued by the FSRCC in April 2013.

[162] *FHC Guidelines* 7.1: "A financial holding company shall have a minimum paid up capital which shall exceed the sum of the minimum paid up capital of all its subsidiaries, as may be prescribed from time to time by the sector regulators (Where the financial holding company owns 100 per cent of the subsidiaries).

Where the financial holding company owns less than 100 per cent of the subsidiaries, its minimum paid up capital shall exceed the summation of its proportionate holding in the subsidiaries.

NB: It is the capital of the Holdco that is applied to the subsidiaries. Excess capital in one subsidiary shall not be used to make up a shortfall in another subsidiary".

[163] In addition, under 2.4.1.2 ii e of the *Framework for Consolidated Supervision of Financial Institutions in Nigeria,* April 2013, if a capital shortfall is determined, the regulator "shall require" the supervised institution to inject "fresh capital" in the holding company within a specified period.

[164] *FHC Guidelines* 7.3.

[165] There seems to be no application of a leverage ratio to banks or FHCs. On the CBN's website, a draft regulation of mortgage refinance companies (MRCs) can be found that includes a 5% leverage ratio. There is also a leverage ratio applied to SME lending by banks, pursuant to the *Prudential Guidelines* of 2010 (at 8.4). It is unclear if the CBN intends to expand application of a leverage ratio to banks and FHCs.

Guidance Notes.[166] Dividend payments by an FHC are not permitted unless three cumulative conditions are met: specified items have been written off; provisions have been made, to the satisfaction of the CBN, for actual and contingent losses; and the capital requirements imposed are met.[167] The detail of Nigerian regulations is shown in the requirement that acquisition of subsidiaries and investments in fixed assets by an FHC must be supported by free funds.[168] Limits are imposed on insider-related transactions as well as contingent liabilities on behalf of subsidiaries.[169]

As regards liquidity, although the *FHC Guidelines* do not specifically address liquidity at group level, the *Framework for Consolidated Supervision of Financial Institutions in Nigeria*[170] requires periodic submission by a holding company of Consolidated Financial Statements which are to be used for consolidated assessments covering, inter alia, liquidity. This Framework[171] also states that the relevant regulator should set the "appropriate prudential limits for liquidity at the group level". We have not however been able to ascertain the existence of a liquidity ratio at group level.

As to limitations on large exposures, the *FHC Guidelines* similarly contain no express provisions on large exposures but the *Framework for Consolidated Supervision of Financial Institutions in Nigeria*[172] requires, in summary, that large exposures within groups are to be identified and kept within limits to be set by the regulator who is to be kept informed of such exposures. The CBN[173] applies limits on large exposures and sets a limit of 1% a bank's share capital to lending to a director or a significant shareholder, except with prior CBN approval.[174]

In addition to other remedies, the CBN may require an FHC to divest from its banking subsidiary if the CBN considers that the FHC is run to the detriment of the interest of the bank's depositors and/or the bank's other stakeholders.[175] There is no intermediate step of suspending voting rights nor any court proceeding foreseen. The CBN has recently reminded banks not to use funds borrowed from the Nigerian banking system to shore up capital. The CBN states "(…) the requirement that funds for the (re) capitalization of financial institutions should NOT be sourced from borrowings within the banking system still subsists". The CBN ends the circular[176] on a severe tone: "Financial institutions are advised to strictly adhere to the above, as breaches will be met with severe regulatory sanctions".

Interestingly, restrictions on lending to group related persons are less strict than in other jurisdictions, for example, in Kenya. The *FHC Guidelines* contain prohibitions of certain intra-group transactions that would undermine the group's overall capital position.[177] The *Framework for Consolidated Supervision of Financial Institutions in Nigeria*[178] prescribes an Intra-Group Transactions Review to capture intra-group transactions and to ring-fence the banks in order to mitigate the risk of contagion.

Submission of an FHC to stress testing was not found specifically in our research. Yet, the *Framework for Consolidated Supervision of Financial Institutions in Nigeria* indicates[179] the need for stress testing in managing risk on a "group wide basis" and requires supervisors to assess the adequacy of such testing "for the group". In its *Guidance Notes on Supervisory Review Process*,[180] the CBN requires

[166] See: CBN INSTRUCTION TO BANKS to complete new reporting template for capital adequacy ratio by July 31 2015—BSD/DIR/GEN/BAS/08/031 of June 24 2015 (REVISED GUIDANCE NOTES ON BASEL II IMPLEMENTATION AND THE REPORTING TEMPLATE FOR CAPITAL ADEQUACY RATIO), available at: http://www.cenbank.org/documents/bsdcirculars.asp; where the following Guidance Notes can also be found:

BSD/DIR/GEN/BAS/08/031/1. Guidance Notes on Regulatory Capital;

BSD/DIR/GEN/BAS/08/031/2. Guidance Notes on the Calculation of Capital Requirement for Credit Risk - Standardized Approach;

BSD/DIR/GEN/BAS/08/031/3. Guidance Notes on the Calculation of Capital Requirement for Market Risk;

BSD/DIR/GEN/BAS/08/031/4. Guidance Notes on the Calculation of Capital Requirement for Operational Risk—basic indicator approach (BIA) and Standardized Approach (TSA);

BSD/DIR/GEN/BAS/08/031/5. Guidance Notes on Supervisory Review Process; and

BSD/DIR/GEN/BAS/08/031/6. Guidance Notes on Pillar III—Market Discipline.

[167] *FHC Guidelines* 7.2.

[168] *FHC Guidelines* 7.4 and 7.5.

[169] *FHC Guidelines* 7.6 and 7.7.

[170] *Framework for Consolidated Supervision of Financial Institutions in Nigeria* 2.4.1.1 (ii) b.

[171] *Framework for Consolidated Supervision of Financial Institutions in Nigeria* 2.4.1.5 (ii) c.

[172] *Framework for Consolidated Supervision of Financial Institutions in Nigeria* 2.4.1.4. A warning is also given of the risks of intra-group exposures and an aggregate exposure limit is to be set for each supervised institution, including therefore FHCs: Id. At 2.4.1.4 i. b and ii.

[173] In its *Prudential Guidelines* of 5 May 2010, at 3.2.

[174] In its *Prudential Guidelines* of 5 May 2010, at 3.5.

[175] *FHC Guidelines* 2.4.

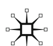
[176] See *CIRCULAR BSD/DIR/GEN/LAB/08/008* of Feb 5, 2015 on the prohibition from borrowing to capitalize banks, available at: http://www.cenbank.org/Out/2015/BSD/RE-PROHIBITION%20FROM%20BORROWING%20TO%20CAPITALIZE%20BANKS.pdf.

[177] *FHC Guidelines* 6.2.

[178] *Framework for Consolidated Supervision of Financial Institutions in Nigeria* 2.4.1.3.

[179] *Framework for Consolidated Supervision of Financial Institutions in Nigeria*, at 2.4.2.1 i. d and at 2.4 2.3 ii. h.

[180] *Guidance Notes on Supervisory Review Process* (BSD/DIR/GEN/BAS/08/031/5) paragraphs 2.3.3 and 2.3.6e.



"banks" (not FHCs) to conduct stress testing and include this in their ICAAP reports.

South Africa

In South Africa, the Banks Act envisages that the Registrar will achieve "effective supervision" of a bank in a group on an "individual" and "consolidated basis".[181] Solo requirements for banks (minimum capital, reserve funds) also apply to controlling companies. A minimum leverage ratio, to be phased into apply as of 2018, also applies to controlling companies. Regulation 36 requires the Registrar to determine on a consolidated basis a controlling company's financial condition and performance including its liquidity position. A Liquidity Coverage Ratio (LCR) and a Net Stable Funding Ratio (NSFR) are to be phased in. Controlling companies are subject to concentration limits; sector and geographical risk spreading is prescribed, while robust board-approved policies must be in place that address double or multiple gearing. Stress testing is also required by regulation.

The Banks Act[182] clearly prescribes "the aggregate amount of capital that a controlling company is required to maintain" and sets the level at equal to or more than the sum of risk-weighted capital requirements prescribed. Moreover, a controlling company is to ensure that its regulated subsidiaries maintain at least the levels required of them by their supervisory authorities. Regulation 36 of the Registrar of Banks in South Africa requires a bank or a controlling company to submit in writing to the Registrar qualitative information relating to the bank's strategy to monitor capital in relation to risks incurred by entities and the allocation of capital among various entities within the banking group.[183]

Regulation 36 on consolidated returns specifies in respect of controlling companies that the objective is "to determine on a consolidated basis the financial condition and performance of the relevant controlling company", and then goes on to list the relevant elements. These include the controlling company's balance sheet and off-balance sheet items; its exposure to credit risk, market risk, operational risk, and currency risk; its profit and loss situation; its capital adequacy; its liquidity position and structure; and its funding sources. The relevant rules make clear that "all the directives, instructions or requirements (…) that relate to a bank on a solo basis shall mutatis mutandis apply to that bank or its controlling company on a consolidated basis".[184]

Controlling companies are thus subject to the solvency and liquidity ratios that their banking subsidiaries need to adhere to, including the observance of a minimum leverage ratio "to supplement the … controlling company's risk-based capital requirements" (to be phased in until full application in 2018).[185] Controlling companies, like banks, have been made subject to liquidity ratios by the introduction, as of 1 May 2015, of an LCR and an NSFR, to be phased in between then and 2019 (LCR) and 2018 (NSFR).[186] Furthermore, Regulation 26(11) newly requires separate reporting of funding concentration "in order to identify potential sources of funding that are of such significance that the withdrawal thereof may cause liquidity problems". Reporting is to be effected on a solo and consolidated basis.[187] Just as banks, controlling companies need to have in place "robust board-approved policies, processes, procedures and systems" on, inter alia, concentration risk and risk management.[188] Similarly, both banks and controlling companies are required to have robust board-approved policies in place that address double or multiple gearing of funds.[189]

Concentration limits apply: exposures equal to or more than 10% of own funds require board approval[190]; non-bank investments are subject to extra capital requirements or to Registrar approval when exceeding 25% of capital.[191]

Regulation 36(16) on intra-group transactions and exposure require banks and controlling companies to have robust arrangements in place to manage intra-group risk and permit the Registrar to take supervisory measures (which may include deduction of capital, demanding adequate collateral, or imposing limitations to exposures) in relation to intra-group risk.

[181] See Section 6 (3). Section 75 (4)(b) confers authority on the Registrar to issue the Regulations summarized in the text requiring holding companies of banks to furnish annual, consolidated financial returns relating to all entities within their banking groups, including their controlling companies.

[182] In Section 70A, especially section 70A(2).

[183] Regulation 36(8)(b)(ix).

[184] See, notably, Regulation 36(5) which reads as follows: "Unless specifically otherwise provided in this regulation 36 or specified in writing by the Registrar, all the relevant directives and interpretations, a) relating to the completion on a solo basis of the relevant risk-based returns by a bank; or b) for the calculation on a solo basis of the relevant minimum required amount of capital and reserve funds of a bank, *shall mutatis mutandis apply to the completion of the consolidated return or calculation of the minimum required consolidated amount of capital and reserve funds to be held by* a bank or *controlling company.*" [Italics, added].

[185] Regulation 38(17)(a) and (b)(iii)(c).

[186] Regulation 26(12) on the LCR and 26(14) on the NSFR.

[187] Regulation 26(11)(a)(v).

[188] Regulation 36(1)(b).

[189] Regulation 36(16)(a).

[190] Article 73(1) Banks Act and Regulation 24(7)(a); such credit exposures when totalling 800% of capital may be subject to additional capital requirements.

[191] Regulation 24(7)(b), based on Article 73(2) Banks Act.

All of the above cannot encompass more than succinctly the breadth and depth of South African banking regulation, which runs into over two-thousand pages in the Government Gazette, including forms and explanatory notes thereto, beyond "regulations" proper. These regulations are prescriptive in detail. As one example, in respect of valuing security when reporting to the Registrar, prudence, reliability and completeness are not only *pre*scribed but also *de*scribed as to what they should imply.[192]

South African banking regulation prescribes stress testing, both by banks and controlling companies themselves and by the supervisor.[193] Banks and controlling companies are to have in place robust board-approved arrangements[194] that enable the senior management of the relevant bank or controlling company to conduct appropriate stress testing or scenario analysis.[195] Most recently, in 2012, the Banking Supervision Department of the South African Reserve Bank undertook a stress testing exercise. These stress tests seem confined to banks only. In the context of its FSAP,[196] the IMF mentions group-wide stress tests as an area for improvement in compliance with Basel Core Principles. As previously mentioned, notwithstanding the extensive regulatory coverage, in its 2015 assessment of the South African prudential regime, the IMF recommended that the authorities should strengthen the monitoring and management of risks from non-banking activities, through group-wide stress testing and improved recovery and resolution planning.[197]

[192] Regulation 24(4)(c) which is just an example among many that could have been included to explain the nature of South African banking regulations. Also, Regulation 39 on Corporate Governance is very detailed and prescriptive, encompassing pages 882–934 in the *Staatskoerant*, whilst mostly providing minimum norms.

[193] Regulations 39 (8)(h), (10) through (16) and (20). The stress testing process must factor in many specific elements: for example see Regulation 39 (14)(b)(viii)(E), *Government Gazette/Staatskoerant* No. 38616 of 27 March 2015 at page 17.

[194] In South African regulatory parlance: "policies, processes, procedures and systems".

[195] Regulation 36(14)(b)(ii)(C).

[196] IMF Country Report No. 15/55 (*Financial Sector Assessment Program—Detailed Assessment Of Compliance On The Basel Core Principles For Effective Banking Supervision*). For a stress test exercise by authorities, see IMF Country Report No. 15/54 (*Stress Testing the Financial System—Technical Note*).

[197] While finding South Africa in compliance with Principle 12 of the Basel Core Principles on Consolidated Supervision, the IMF recommended that "the authorities should make further effort to monitor and manage risks arising from nonbanking activities or parent entities of a financial group (some of which are not bank controlling companies) to which a South African bank belongs. In this regard (…) the authorities should strengthen its technique, such as group-wide stress testing, to monitor and assess those risks. The authorities should further improve the recovery and resolution planning of large banking groups particularly once the necessary power is given to the supervisor by the expected new legislation. Such planning should

The seventh element: group recovery and resolution

Group recovery and resolution

Arising out of the GFC, regulatory reforms in the developed economies of the USA and Europe have included mandatory requirements on larger (often referred to as "systemically important") banking and other financial groups to prepare and keep updated "recovery and resolution plans" (R&R Plans), known colloquially as "living wills". As the names imply, "recovery plans" are designed to restore, in a variety of adverse circumstances, a stressed financial group to financial strength and viability. If this is not feasible, "resolution plans" aim to "resolve" a crisis confronting insolvent institutions by protecting retail depositors, safeguarding essential functions performed by the banking system and allowing an orderly exit for a bank's business that has proved not to be viable, without adverse systemic impacts on economies or recourse to taxpayer funds, as occurred in several instances in 2008–2010.

There are many common features of R&R Plans, including the fact that they apply to bank holding companies as to other members of banking groups. However, R&R Plans, as they are tailor-made to fit the individual banking group to which they apply, also differ markedly from each other and recent experience has shown that the preparation and maintenance of these plans has become increasingly costly, complex and detailed.

Kenya No group-wide R&R Plans seem to be mandated for banking groups. However, a range of prudential limits and prescriptions applicable to banks and NOHCs, embodied in the Kenyan Banking Act and Guidelines issued by the CBK, are aimed at preserving the safety and soundness of banking groups and the financial system, and, if banking groups are in stressed circumstances, allow for corrective enforcement action to be taken as CBK considers necessary.

Thus, CBK Guidelines address specific topics that are typically required in bank recovery or resolution plans. For example, the *Guideline on Liquidity Management* requires banks to "have a formal Contingency Funding Plan (CFP) that clearly sets out the strategies for addressing liquidity shortfalls in emergency situations. A CFP should outline policies to manage a range of stress environments, establish

Footnote 197 continued
also consider scenarios where shocks originate from non banking entities or parent groups". IMF Country Report 15/55 (*South Africa: Financial Sector Assessment Program-Detailed Assessment of Compliance on the Basel Core Principles for Effective Banking Supervision*), at: https://www.imf.org/external/pubs/ft/scr/2015/cr1555.pdf, published on 3 March 2015.

clear lines of responsibility, include clear invocation and escalation procedures and be regularly tested and updated to ensure that it is operationally robust".[198] These requirements apply to banks on a solo basis and expressly "extend" to groups as well, so that liquidity is to be monitored on a consolidated basis.[199]

Moreover, the Banking Act[200] gives very broad powers to the CBK to intervene in the business of any bank that the CBK believes is being conducted in a manner contrary to the best interest of its depositors or members of the public. In these circumstances, the CBK may give advice and recommendations and issue directions to the bank, and appoint competent persons to do likewise.[201] The CBK may also issue directions to any member of a banking group (including the group's NOHC) to eliminate "irregularities", such as violations of the Banking Act or activities that have a detrimental impact on the bank or may jeopardise the interest of depositors.[202] The CBK's powers extend to suspending the exercise of an NOHC's control of the bank.[203]

CBK Guidelines are more granular. For example, the *Guideline on Prompt Corrective Action CBK/PG/21* subjects banks with a rating on a CAMELS[204] score of less than "3", or in other specified risky conditions,[205] to "a framework of supervisory actions of increasingly severe enforcement actions" known as "Prompt Corrective Action". This may require such banks to submit a Capital Restoration Plan, to restore capital adequacy, or resolve all deficiencies, or otherwise engage with the CBK in undertakings to restore the viability of the institution. Under the same *Guideline*, the CBK has the power to issue a "PCA Order"[206] to a significant shareholder (among others), and therefore to an NOHC.[207] The CBK may also impose a wide range of additional supervision, management and measures on undercapitalised banks and, in certain circumstances, restrict dividend payments and suspend an NOHC's control of a bank, if the NOHC is a cause of the actions or violations that are the subject of a PCA Order.[208]

If a bank fails, the CBK may hand the management and control of the bank over to the Kenya Deposit Insurance Corporation to resolve matters[209] and, on liquidation or winding up of the bank, the CBK may revoke its banking licence.[210]

A further *Guideline* on *Business Continuity Management* CBK/PG/14 concerns continuity in the face of disruption rather than restoration of financial stability.[211]

Nigeria No group-wide R&R Plans seem to be prescribed for banking groups in Nigeria and this has been a matter of concern to the International Monetary Fund.[212] Although there is no formal requirement in Nigeria for R&R planning, the introduction in 2010 of the New Banking Model, providing for a holding company structure, "made it imperative for the adoption of a consolidated approach to the supervision of financial conglomerates"[213] to complement the supervision of individual financial institutions on a solo basis.[214] The essence of such supervision is to assess the overall safety and soundness of each financial group having regard to many of the factors that would ordinarily be addressed in recovery or resolution plans, including capital adequacy, contagion risk, intra-group and large exposures, liquidity, corporate governance, risk management and controls,

198 *Guideline on Liquidity Management CBK/PG/05* 4.2.4.

199 *Guideline on Non-Operating Holding Companies CBK/PG/24* 8.1.

200 In Sections 33–35.

201 Banking Act Section 33 (1).

202 Banking Act Section 33 (1A).

203 Banking Act Section 33 (1C)(b).

204 This rating system, recognized internationally, is used by bank supervisors to rate financial institutions according to six factors represented by the acronym CAMELS: Capital adequacy, Asset quality, Management capability, Earnings quantity and quality, the adequacy of Liquidity and Sensitivity to market risks. Supervisors assign a score on a scale of one (the best) to five (the worst) and exercise increasing scrutiny over higher scored institutions.

205 *Guideline on Prompt Corrective Action* CBK/PG/21 3.1 (2).

206 A PCA Order is a written directive stipulating the actions and violations from which an institution must cease. The remedial actions that an institution should take include adopting a Capital Restoration Plan and strengthening the board of directors and management: *Guideline on Prompt Corrective Action* CBK/PG/21, 1.4.

207 *Guideline on Prompt Corrective Action* CBK/PG/21 4.3.4.

208 *Guideline on Prompt Corrective Action* CBK/PG/21 4.3.4.6, 4.3.4.7, 4.4 and monetary penalties may be assessed: 4.3.4.9.

209 Banking Act Section 34.

210 Banking Act Section 6.

211 See also CBK *Guideline on Voluntary Liquidation* CBK/PG/18.

212 The lack of arrangements for cross-border supervision and resolution has been a matter for concern in the IMF's Financial Sector Assessment Program. See: IMF Country Report No. 13/142 (*Financial Sector Assessment Program Nigeria Banking Cross-Border Issues Technical Note*), at: http://www.imf.org/external/pubs/ft/scr/2013/cr13142.pdf. The IMF also called upon the CBN to implement R&R planning for SIFIs in Nigeria, and put forward a number of suggestions for improving the resolution and crisis management framework. See: IMF Country Report No. 13/140 (*Nigeria: Financial Sector Stability Assessment*), at: http://www.imf.org/external/pubs/ft/scr/2013/cr13140.pdf, p. 28, and paras. 56-69. For specifics, see IMF Country Report No. 13/143 (*Nigeria: Financial Sector Assessment Program Documentation—Technical Note on Crisis Management and Crisis Preparedness Frameworks*), at: http://www.imf.org/external/pubs/ft/scr/2013/cr13143.pdf.

213 *Framework of Consolidated Supervision of Financial Institutions in Nigeria, 1.4.*

214 *Framework of Consolidated Supervision of Financial Institutions in Nigeria, 1.6, 2.1 and 2.2.*

compliance and audit, access to prudential information and moral hazard risks.[215]

In addition, the CBN may apply corrective measures to a "failing bank" pursuant to sections 35(2) and 36 of the BOFI Act, including curtailing its operations, directing necessary action, removing/substituting any manager or director, and appointing advisers. If the state of affairs of the bank does not improve, the CBN may turn over control and management of the bank to the Nigeria Deposit Insurance Corporation (NDIC) and to the Supervisory Intervention Framework for the Nigerian Banking Industry in Nigeria. The NDIC may then require the bank to submit a recapitalisation plan and take such other action as NDIC considers necessary.[216] If the bank cannot be rehabilitated, NDIC may recommend "other resolution measures", including "revocation of the [failed] bank's licence", and leading to the winding up of the bank.[217] Such measures may affect the FHC's position.

Under sections 62 and 63 of the BOFI Act, the same corrective measures as stipulated in section 35 of that Act may be applied to "other financial institutions" that are failing. An FHC is defined as an "other financial institutions",[218] ultimately allowing resolution of a failing FHC, including revocation of its FHC license and winding up of the FHC.

South Africa Although South Africa is preparing a framework for the resolution of financial institutions,[219] the absence of required R&R planning was deplored by the IMF in the country's recent FSAP assessment.[220] Regulation 36 on consolidated supervision[221] merely requires banks and controlling companies to report to the Registrar on contingency planning. Amendments to the Regulations introduced in March 2015 also require banks (and controlling companies) to have sufficient capital and reserves to withstand severe but plausible market shocks.[222] A SARB Guidance Note,[223] which is addressed to controlling companies, as well, gives indications on how to start establishing recovery plans.

The eighth element: information and reporting to supervisors

Kenya

The Banking Act confers very broad powers on the CBK to require banks to furnish information as the CBK "may reasonably require for the proper discharge of its functions", including information (audited if required) relating to the NOHCs, and to require the NOHC (among others) to provide information or documents for the CBK to ascertain the structure and linkages, risk profile and conduct of risk management of the banking group.[224] Further powers of the CBK to obtain information from banks, NOHCs and their shareholders are to be found in the CBK Guidelines.[225]

Reporting obligations with respect to capital, liquidity, large exposures, exposures to related parties and lending limits apply to the NOCH as much as to its banking subsidiaries.[226] Additional reporting requirements may be imposed by the CBK, also on the NOHC[227] and on "such subsidiaries and associates of the bank within or outside Kenya as the Central Bank may specify, which may differ from the consolidation required under International Financial Reporting Standards".

Approved NOHCs must submit annually to the CBK[228]: audited financial statements; chart(s) showing the relationships with their subsidiaries, associates and significant shareholders and their businesses, services and locations; lists of significant shareholders, directors and senior officers of those companies; particulars of all external auditors[229] of,

[215] *Framework of Consolidated Supervision of Financial Institutions in Nigeria, 2.3 and 2.4.*

[216] BOFI Act Section 37.

[217] BOFI Act sections 39 and 40, after application to the Federal High Court.

[218] *FHC Guideline* 9.0 xii.

[219] National Treasury, SARB and Financial Services Board, *Strengthening South Africa's Resolution Framework For Financial Institutions*, 2015, at: http://www.treasury.gov.za/publications/other/RFFI/2015%20Resolution%20Framework%20Policy.pdf. The SARB is to be the resolution authority.

[220] IMF Country Report 15/53 (*South Africa: Financial Sector Assessment Program-Financial Safety Net, Bank Resolution, and Crisis Management Framework-Technical Note*), at: https://www.imf.org/external/pubs/ft/scr/2015/cr1553.pdf.

[221] Regulation 36(8)(b)(xi).

[222] See Regulations 39 (14)(B)(viii)(F) and 39(20).

[223] Guidance Note G4/2012, at: https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/5034/G4%20of%202012.pdf.

[224] Banking Act Section 28(1) through (3).

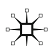
[225] For example *Guideline on Non-Operating Holding Companies CBK/PG/24 4.0,* 6.1 and 6.2. In addition, the CBK has wide powers to inspect banks and gather information on holding companies under section 32 of the Banking Act.

[226] *Guideline on Non-Operating Holding Companies CBK/PG/24* 10.1, in conjunction with *Guideline on Consolidated Supervision* CBK/PG/19 3.3.5.

[227] *Guideline on Non-Operating Holding Companies* CBK/PG/24 10.1, in conjunction with *Guideline on Consolidated Supervision* CBK/PG/19 3.4.

[228] *Guideline on Non-Operating Holding Companies CBK/PG/24* 10.2.

[229] External auditors of an approved NOHC must be approved by the CBK and the CBK may require a banking group to retain a single auditor to provide an overview review of the group including consolidated financial statements: see *Guideline on Non-Operating*



and supervisory authorities over, those companies; and a chart of the group management structure. In addition, an NOHC must submit various returns listed in the NOHC Guidelines[230] on a solo and consolidated basis and may be required to submit any information (if requested, reviewed by the NOHC's auditors) that the CBK considers is required for its supervisory functions.[231] Such information may be published by the CBK.[232]

Nigeria

FHCs are supervised by the CBN and are required to render returns in a format prescribed by the CBN from time to time.[233] Under the BOFI Act, the CBN has extensive regulatory and supervisory powers over financial institutions, including FHCs.[234] They must provide a wide range of information to the CBN including consolidated financial reports of their group and audited and un-audited Consolidated Financial Statements[235]; reporting of, and supervision over, an array of elements is prescribed in respect of FHCs[236]; and the information is to be shared among supervisors to ensure effective supervision of cross-border groups.[237]

South Africa

Banks and controlling companies must obtain prior approval from the Registrar to acquire subsidiaries or other specified business entities.[238] In addition, controlling companies are under an obligation to disclose to the Registrar a far-reaching range of information under the Banks Act, including their subsidiaries and other entities,[239] their directors and officers,[240] their shareholders (annually),[241] the statutory notices and reports to their shareholders, financial statements and minutes of general meetings.[242] Controlling companies must also receive prior Registrar approval to the appointment of their auditors.[243] Both a bank and a controlling company must notify the Registrar, stating the reasons, for a failure or inability to maintain the minimum capital and reserve funds as prescribed by the Registrar.[244]

Moreover, Regulation 36, in emphasising the importance of consolidated supervision of all financial entities and activities of financial groups, mandates the provision by controlling companies to the Registrar of extensive information, on a solo and consolidated basis, in respect of: the group as a whole, its structure and its risk strategy, on where in the group excess capital is to be held, on the allocation of capital in the group, on group strategy on funding and liquidity management, on exposures, and on group contingency planning. Specifically, a controlling company needs:

- to share with the Registrar correspondence (of the controlling company or its subsidiaries or representative offices) with foreign supervisors on issues that may, or are likely to, have a material impact on the Registrar's supervisory duties[245];
- to share information that may negatively affect, or is likely to negatively affect, the suitability of a major shareholder (see footnote 245);
- to provide the supervisor with group structure, both business line and legal structure, and the "control structure"[246];
- to submit information on group strategy with the supervisor, notably on (see footnote 246):
    - risk, and risk appetite, in the group
    - capital, and capital distribution, in the group
    - funding and liquidity management
    - contingency planning
    - Intra-group transactions limitations
    - risk concentration.

The ninth element: public disclosure requirements

Kenya

As mentioned above, banks in Kenya are subject to extensive obligations to furnish information to the CBK.

Footnote 229 continued
Holding Companies CBK/PG/24 9.1 and 9.3 and Banking Act section 32B.

230 See *Guideline on Non-Operating Holding Companies CBK/PG/24* 10.3.

231 *Guideline on Non-Operating Holding Companies CBK/PG/24* 4.0.

232 *Guideline on Non-Operating Holding Companies CBK/PG/24* 4.1.

233 FHC Guidelines 8.1 and 8.2.2.

234 Sections 57, 61 and 62 of the BOFI Act, as well as the power to appoint examiners to carry out examination of the books and affairs of "other financial institutions" (section 61(2) and (3)), which include FHCs: *FHC Guideline* 9.0 xii.

235 *Framework for Consolidated Supervision of Financial Institutions in Nigeria* 2.4.1.1ii.

236 These elements include intra-group financial transactions, large exposures, group structure and governance, and risk management. See FHC Guideline 2.4.1–2.4.2.

237 *Ibid.* 2.5.4.

238 Article 52 Banks Act and Regulation 56.

239 Section 53 Banks Act.

240 Section 58 Banks Act.

241 Section 59 Banks Act.

242 Section 65 (1) and (2) Banks Act.

243 Section 61 Banks Act.

244 Section 74 (1) Banks Act.

245 Regulation 36 (8)(a).

246 Regulation 36 (8)(b).

Section 31(1) of the Banking Act authorises the CBK to publish that information as it thinks fit.[247] In addition, banks are subject to regular public disclosure of balance sheets and financial statements on a consolidated basis[248] and at a "minimum" the following broad categories of information must be publically disclosed in clear terms and appropriate detail to achieve transparency: "financial performance; financial position (including capital, solvency and liquidity); risk management strategies and practices; risk exposures (including credit risk, market risk, liquidity risk, and operational, legal and other risks); aggregate exposure to related parties and transactions with related parties; all material entities in the group structure; accounting policies; and basic business, management and corporate governance information".[249] These requirements do not expressly apply to NOHCs but, since the disclosures extend to consolidated group figures, they would normally encompass the financial condition of the relevant NOHC.

The *Guideline on Corporate Governance* requires that key particulars (including the decision-making process, criteria and amounts) of compensation of directors, the CEO and senior management of banks should be disclosed in the Annual Report.[250] Further requirements promoting timely and transparent public disclosures of corporate governance by banks are to be found in paragraph 3.14 of the same Guideline. The Corporate Governance Guideline also requires the board of the parent company of a bank "to set and approve a corporate governance policy at the group level for its subsidiaries, which includes the commitment to meet all applicable governance requirements"[251] and it is our understanding that the CBK is of the view that the Corporate Governance Guideline extends to NOHCs.

Nigeria

In Nigeria, the Code of Corporate Governance[252] imposes extensive transparency and public disclosure requirements on banks and other institutions under its purview and these must be complied with by FHCs.[253] Banks are encouraged to make "robust disclosures beyond the statutory requirements" of the BOFI Act and other applicable laws.[254] Disclosures shall include, but not be limited to, material estimates and their rationale, details on directors and corporate governance, risk assets and risk management, core business modifications, regulatory/supervisory contraventions and corrective actions, sanctions, capital structure and adequacy, related party contracts, contingency planning framework and any other matters capable of significantly affecting the bank's financial condition or status as a going concern.[255]

Banks (and FHCs) must also independently verify the integrity of their financial reporting, establish and implement whistle-blowing and risk management policies, consistent with the requirements of the Code,[256] and communicate with their shareholders via bank websites.[257]

In addition, recent Guidance Notes[258] emphasise that the extensive disclosure required of "banks" will impact upon their holding companies. For example, disclosure is required of any "impediment to the prompt rapid transfer of regulatory capital or funds within the group" and "any reduction in individual capital requirements applied to the parent entity and the Nigerian subsidiaries".[259]

South Africa

Limited public disclosure requirements on banks or controlling companies are to be found in the Banks Act.[260] However, Regulation 43 prescribes what a bank, or if controlled by a controlling company, then the controlling

[247] Section 31 (1) clarifies that the information is not to be published if it would disclose the financial affairs of any person, without the prior written consent of that person.

[248] *Guideline on Publication of Financial Statements and Other Disclosures* CBK/PG/10. This Guideline requires publication in a newspaper of national circulation of audited financial statements (annually, see CBK/PG/10 3.2) as well as un-audited statements (quarterly, see CBK/PG/10 3.3), as well as availability on the bank's website (CBK/PG/10 3.4).

[249] *Guideline on Publication of Financial Statements and Other Disclosures* CBK/PG/10 3.5. This Guideline has more than 50 pages of forms and notes explaining the disclosures required. However, no mention is made of disclosure of countercyclical capital buffers, credit and dilution risk exposures, leverage ratios or credit risk mitigation techniques.

[250] *Guideline on Corporate Governance* CBK/PG/02, at 3.11.2h.

[251] *Guideline on Corporate Governance* CBK/*PG*/02, at 3.6.2 II.b.

[252] *Code of Corporate Governance for Banks and Discount Houses in Nigeria,* May 2014 (the "*Nigerian Corporate Governance Code") 5.0.*

[253] *Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria* 4.0 d i.

[254] *Nigerian Corporate Governance Code 5.1.1.*

[255] *Nigerian Corporate Governance Code 5.1.2.*

[256] *Nigerian Corporate Governance Code 5.2, 5.3 and 6.0.*

[257] *Nigerian Corporate Governance Code 3.1.3,* which provides further that website communication "shall include major developments in the bank, risk management practices, executive compensation, local and offshore branch expansion, establishment of investment in subsidiaries and associates, Board and top management appointments, sustainability initiatives and practices, etc".

[258] *Guidance Notes on Pillar III—Market Discipline* (BDS/DIR/GEN/BAS/08/031/6).

[259] *Id.* at Table 2 (c) and (d).

[260] See Banks Act, sections 66 and 67.

company,[261] must disclose to the public. The public disclosure requirements for banks and controlling companies have recently been expanded significantly.[262] These amendments to Regulation 43, encompassing 39 pages in the Government Gazette, confirm the detailed nature of South African prudential rules. The extent of public disclosure required by Regulation 43 is too vast to summarise in detail in this article. In brief, the Regulation requires "reliable, relevant and timely qualitative and quantitative information that enable users … to make an accurate assessment of the bank's financial condition, including its capital adequacy position, and financial performance, business activities, risk profile and risk-management practices", provided that the bank shall have in place a formal board-approved policy relating to disclosure that satisfies the Regulation's requirements.[263] The disclosures must include the degree of specificity of information mandated on such topics as capital, reserve funds, countercyclical buffers, liquidity, various risks, securitisations and remuneration.

The tenth element: AML-CTF requirements[264]

Kenya

The CBK has issued a specific Guideline[265] on the topic of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CTF). The Guideline expressly applies to all banks and their foreign branches and subsidiaries.[266]

The Guideline addresses the prevention, detection and control of possible money laundering and terrorism financing and imposes obligations of prudent customer identification ("know-your-customer"), record keeping, suspicious activity identification and reporting, and risk assessments.[267] The board of directors and management of a bank are responsible to establish policies and to train staff accordingly.[268]

The Guideline does not expressly apply to "groups", "parents" or "NOHCs", but anti-money laundering legislation in Kenya[269] would apply to those institutions to the extent of its jurisdictional reach and the *Guideline on Corporate Governance* CBK/PG/02 addresses parents (i.e. also NOHCs) as responsible for group-wide governance and risk management which, of course, includes AML/CTF.

Nigeria

Money laundering is prohibited in Nigeria and this applies to all persons and bodies corporate.[270] The financing of terrorism is a criminal offence.[271] Moreover, the CBN (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations, 2013 apply to "banks and other financial institutions in Nigeria, within the regulatory purview" of the CBN[272] and therefore apply to FHCs[273] in Nigeria.

South Africa

Regulation 36(17) requires "every bank and every controlling company" to have in place "board-approved policies and comprehensive risk-management processes and procedures" that include robust know-your-customer standards to prevent, among other things, the bank or controlling company from being used for money laundering or other unlawful activity.[274] In addition, the policies, processes and procedures must be robust enough to ensure that every relevant foreign branch, subsidiary or operation of the bank or controlling company implements and applies AML/CTF measures consistent with current Financial Action Task Force (FATF) recommendations and the

[261] Regulation 43(3).

[262] See: Banks Act (94/1990): Amendment of Regulations. Effective 1 July 2016, at: https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/7306/Amended%20Regulations%20effective%201Jul2016.pdf.

[263] Regulation 43(1), which also states that each material item must be disclosed separately: Regulation 43(1)(c). With approval of the Registrar, proprietary or confidential information need not be disclosed: Regulation 43(1)(i).

[264] In some jurisdictions (for example, in the US), BHCs are expressly required by supervisory guidance to have regard to other considerations, such as environmental sustainability.

[265] *Guideline on Anti-Money Laundering and Combating the* Financing *of Terrorism* CBK/PG/08.

[266] *Ibid*. 1.2 and 2.2.1. Customer due diligence must also be carried out by banking agents: *Guideline on Agent Banking* CBK/PG/15 3.9.

[267] More particularly elaborated in part 5 of the *Guideline on Anti-Money Laundering and Combating the* Financing *of Terrorism* CBK/PG/08 5.

[268] *Id.* 2.3.

[269] For example, the *Proceeds of Crime and Anti-Money Laundering Act 2009*, as amended.

[270] Money Laundering (Prohibition) Act, 2011, as amended, Section 15(1) and (2).

[271] Terrorism Prevention Act, 2011 as amended, Section 13.

[272] CBN (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations, 2013, section 3. See also Part 5 and Annexures 7and 8 of those regulations at: http://www.cbn.gov.ng/out/2010/publications/bsd/prudential%20guidelines%2030%20june%202010%20final%20%20_3_.pdf.

[273] See *Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria* 9.0 xii.

[274] Regulation 36(17)(a)(iv). Extensive AML/CTF control and compliance requirements are mandated by the Financial Intelligence Centre Act, 2001 as amended.

higher of AML/CTF standards in South Africa or in the host country (and, if unable to do so, the bank or controlling company must inform the Registrar).[275]

A general comparison with the USA and the EU

United States of America

Bank holding companies and the Bank Holding Company Act

In the USA, large banking organisations are normally organised in a bank holding company (BHC) structure. In essence, a BHC is "any company which has [direct or indirect] control over any bank or over any company that is or becomes a bank holding company", with "control" defined generally as either more than 25% of the voting stock, or the power to control the election of board members or trustees of the bank or BHC, or which the Federal Reserve Board determines to have control over the banks or BCH's management or policies.[276]

Typically, a large US parent BHC would own a number (some have thousands[277]) of domestic bank subsidiaries engaged in banking activities, as well as non-banking and foreign subsidiaries engaged in a broader range of business activities, such as securities dealing and underwriting, insurance, private equity, real estate, trust services, and asset management. US BHCs as a group today control more than $17 trillion in total assets.[278]

Some of the earliest principles specifically governing the regulation and supervision of BHCs originated in the US, and have been progressively refined and strengthened over the years. The allowable scope of BHC activities is defined primarily by a federal statute, the Bank Holding Company Act of 1956, as amended[279] (the BHC Act). Two key objectives of that Act were (a) to limit the commingling of banking and commerce; and (b) to enhance financial stability by requiring BHCs to maintain minimum capital ratios and to act as a source of financial and managerial strength to their banking subsidiaries by providing financial or other assistance to subsidiaries if in distress.

The first objective of the BHC Act has gone through remarkable changes since its initiation in the early 1930s when US federal legislation (known colloquially as the "Glass-Steagall Act"[280]) mandated the separation of commercial and investment banking and imposed restrictions on "speculative" bank activities. From the 1960s, progressive administrative relaxation of some of these restrictions, as well as various amendments to the BHC Act and other legislation, broadened the scope of BHC activity. Gradually, holding companies were able to engage directly or indirectly in activities that were "closely related to banking" (including certain securities, insurance and merchant banking activities) and even to register with the Federal Reserve as "financial holding companies" (FHCs).[281] These developments ultimately led in 1999 to the repeal of the Glass-Steagall Act prohibitions[282] and commercial and investment banking in the USA could again be affiliated. However, following the 2007–2008 global financial crisis, calls for financial sector reform, including for the reinstatement of the Glass-Steagall restrictions, prompted the enactment in 2010 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[283]

[275] Regulation 36(17)(b)(ii). Deficiencies in the effectiveness of South Africa's reinforced AML/CTF legislation and enforcement are noted in IMF Country Report 15/51 (*South Africa: Financial Sector Assessment Program-Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)-Technical Note*), March 2015, at: https://www.imf.org/external/pubs/ft/scr/2015/cr1551.pdf. However, these relate mainly to information on beneficial ownership of funds and strengthening enforcement capacity and do not address group-wide or controlling companies' AML/CTF practices.

[276] See the definitions in Regulation Y at 12 CFR § 225.2 (e). Regulation Y is at http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=7ca6da867eb5c16a11991c9693ecceb0&mc=true&n=pt12.3.225&r=PART&ty=HTML. For the statutory definition of BHCs in the US, see 12 USC § 1841—Definitions, at: https://www.law.cornell.edu/uscode/text/12/1841.

[277] Reasons for the proliferation of BHCs in the US are varied. Historically, they enabled banking groups to circumvent restrictions on expansion into new geographical or product markets, to benefit from tax advantages, to get access to greater funding sources, or to take advantage of economies of scale. For a brief description of the development of BHCs in the US, as of July 2012, see https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf.

[278] As of 30 June 2016, there were 133 US financial/bank holding companies with reported assets exceeding $10 billion, holding total assets exceeding $17 trillion: see https://www.ffiec.gov/nicpubweb/nicweb/HCSGreaterThan10B.aspx.

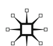
[279] 12 USC § 1841 et seq. At https://www.law.cornell.edu/uscode/text/12/chapter-17.

[280] The Banking Act of 1933, Pub.L. 73-66, 48 Stat. 162, named after the sponsors of the provisions in that Act that mandated the separation of commercial and investment banking. The Act also established the Federal Deposit Insurance Corporation (FDIC) and a federal system of bank deposit insurance which, as modified over the past 80 years, continues today.

[281] For a list of FHCs, see https://www.federalreserve.gov/bankinforeg/fhc.htm#company_href.

[282] By the Financial Services Modernization Act of 1999, Pub.L. 106–102, 113 Stat. 1338, known as the Gramm-Leach-Bliley Act). This Act was also supported by lobbying from the banking industry and underpinned by developments in banking products that blurred the distinction between banking and securities.

[283] Pub.L. 111–203, 124 Stat.1376, at: https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm. For summaries of the statute, see: https://www.congress.gov/bill/111th-congress/house-bill/4173.



The Dodd-Frank Act is a very lengthy statute with ambitious objectives that seeks to address some of the causes of the global financial crisis and provides the framework for a strengthened financial system in the US.[284] It is not possible in this article to summarise the Act but merely to say that, during its contentious passage into law, several attempts were made to include text that would have reinstated the mandatory separation of commercial and investment banking (i.e. the core principles of the Glass-Steagall Act). These attempts were unsuccessful but the Dodd-Frank Act does contain some provisions that limit activities of banks and BHCs viewed as "speculative". For example, the Act seeks to prohibit banks, BHCs and non-bank financial companies supervised by the Federal Reserve, from engaging in proprietary trading (i.e. trading for their own account) or acquiring or retaining any ownership interest in, or sponsoring, hedge funds or private equity funds, subject to certain exemptions.[285] Final Regulations concerning these prohibitions became effective in April 2014.[286] However, at the request of the banking industry, implementation of some of these prohibitions has been delayed until July 2017 and may be extended even further.[287]

The second objective of the BHC Act (enhancing financial stability through well capitalised BHCs acting as sources of strength to their banking subsidiaries) has continued to be a cornerstone of BHC regulation in the USA and, as summarised further below, regulatory improvements over the past 50 years have sought to reinforce this objective.

Under the BHC Act, responsibility for regulating and supervising BHCs lies with the Board of Governors of the Federal Reserve System (the Federal Reserve) and the core requirements of such supervision are contained in regulations issued by the Federal Reserve[288] and in the US Federal Reserve Bank Holding Company Supervision Manual, updated to July 2016 (the BHC Manual).[289]

The BHC Manual and related materials are almost 2000 pages in length and they have been revised and updated over many decades to take account of legislative and regulatory changes and contemporary best practices. The statutory and other guidance that the Manual provides is extremely detailed, covering a wide spectrum of BHC group activities. It is therefore possible in this article merely to summarise highlights of the Manual and the main topics of BHC activity that are regulated and supervised in the US, as a point of comparison with the regulation and supervision of BHCs in the African countries that are the focus of this article. The long-established tradition of BHC regulation in the USA, compared to the more recent inclusion of their European counterparts in the scope of supervision, allows for a more cursory description of the main lines of American BHC supervision than we undertake below for the European Union (EU) and the Euro Area (EA).

Objectives of the BHC Manual

The BHC Manual[290] is the primary source of guidance for supervisors when conducting inspections of BHCs and their subsidiaries and therefore the Manual provides valuable guidance to BHCs of the ways in which they should conduct their activities. The BHC Manual emphasises the need for BHCs to maintain financial strength on an on-going basis and for BHC directors and managers to be aware of, and manage, all risks effectively, including the effects or consequences of transactions between the BHC, its non-banking subsidiaries and its subsidiary banks.

Regulation and supervision of BHCs in the US—a brief overview

In the US, over the last 50 years, BHCs have experienced ever-increasing levels of regulation and supervision. Prior

[284] The Dodd-Frank Act has 848 pages and its title summarises its wide remit as an Act: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes".

[285] Known colloquially as the "Volcker Rule", these prohibitions are contained in Section 619 of the Dodd-Frank Act (124 Stat. 1620), amending Section 13 of the BHC Act (12 USC § 1851) The section defines hedge funds and private equity funds broadly so that they would cover venture capital funds and pooled investment vehicles, but provides a number of exceptions. See at: https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm.

[286] See 12 CFR Part 248, effective 1 April 2014.

[287] Three extensions of one year each, allowing banks to retain ownership of interests in hedge funds and private equity funds, have been granted by the Federal Reserve under Regulation Y, CFR § 225.181(a). A further extension of up to five years may be granted in respect of holdings of "illiquid funds" under CFR § 225.181(b). See also the following press reports: http://www.marketwatch.com/story/fed-extends-deadline-again-for-volcker-rule-implementation-2016-07-07; and http://www.cnbc.com/2016/08/11/reuters-america-exclusive-wall-st-banks-ask-fed-for-5-more-years-to-comply-with-volcker-rule.html.

[288] In particular, Regulation Y (12 CFR Part 225) on Bank Holding Companies and Change in Bank Control, which regulates the acquisition of control of banks and defines the non-banking activities in which a BHC or FHC may engage directly or through a subsidiary; and Regulation K (12 CFR Part 211) on International Banking Operations which, among other things, regulates certain foreign activities of banking organisations, including BHCs.

[289] See: https://www.federalreserve.gov/boarddocs/supmanual/bhc/bhc.pdf.

[290] Which is one among many supervisory manuals: see: https://www.federalreserve.gov/boarddocs/supmanual/.

to the mid-1970s, legislative concerns were mainly directed toward encouraging increased competition and reducing concentrations of financial resources, as well as defining the proper range of "banking" activities. Since then, it has been recognised, in addition, that the impact of BHCs could weaken the financial condition of banks within BHC groups and this has led to increasing supervision of BHCs as a means of protecting the stability of the financial system. Thus, regulations governing BHCs expressly require that a BHC "shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner".[291] Moreover, whenever the Board believes an activity of a BHC constitutes a serious risk to the financial safety, soundness, or stability of its subsidiary bank and is inconsistent with sound banking principles or the purposes of the BHC Act or the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*), the Federal Reserve may require the BHC to terminate the activity or to terminate control of the subsidiary.[292]

Today the Federal Reserve engages in very extensive supervision and inspection of BHCs. The focus is on any member of the BHC group (including banking and non-banking entities) that could have a materially adverse effect on the safety and soundness of any banking subsidiary due to (1) the size, conditions or activities of the subsidiary or (2) the nature and size of intra-group transactions. The banking subsidiaries themselves are supervised by their respective federal or state supervisors[293] and the Federal Reserve uses the bank examination reports prepared by those supervisors, as well as reports on non-banking subsidiaries, prepared by other regulators, for example, the US Securities and Exchange Commission or state insurance regulators, among others.

Federal Reserve approval is required for a company to become a BHC, as well as the acquisition by a BHC of more than 5 per cent of the voting securities of a bank or BHC, subject to some exemptions.[294] The BHC Act and regulations require all BHCs to be registered with the Federal Reserve, to file reports at least annually and for their groups to be subject to examination and inspection by the Federal Reserve.[295] In summary, and subject to some exemptions, BHCs and their subsidiaries are restricted in their activities. They must not engage in, or acquire or control directly or indirectly, any activity other than banking or managing or controlling banks, or an activity that is so closely related thereto as approved by the Federal Reserve.[296]

The BHC Act requires BHCs to be supervised on a consolidated basis by the Federal Reserve.[297] Consolidated supervision of a BHC is intended to cover the parent company and its subsidiaries, and gives the opportunity to the Federal Reserve to understand the organisation's structure, activities, resources, and risks, in the hope that the supervisor and group management will address financial, managerial, operational, or other deficiencies before they pose a danger to banks within the BHC's group. Capital adequacy standards apply to the BHC.[298] The rules are far-reaching and prescriptive and capital requirements imposed by the Federal Reserve are to be countercyclical.[299] They include supervisory powers to deduct holdings in banks from a BHC's capital and deduct capital holdings in other "banking organisations" so as to avoid double gearing.

The Federal Reserve[300] has set licensing processes for BHCs, laid down the types of activities that a BHC may undertake and reviews the suitability of shareholders and corporate governance and, in some circumstances, the fitness of the BHC's directors and senior managers. As set out in the BHC Manual, the Federal Reserve regularly inspects BHCs and their subsidiaries concerning, among other things, each group's financial condition and whether it monitors and controls financial and operational risks and complies with relevant laws (including consumer protection laws). The Federal Reserve may take action against a BHC or non-bank subsidiary to correct unsafe or unsound

[291] 12 CFR § 225.4(a)(1).

[292] 12 USC § 1844 (e) and 12 CFR § 225.4 (a)(2).

[293] In the US, primary supervisory authority and coordination responsibilities are organised as follows: the Office of the Comptroller of the Currency (US Treasury)—national banks, federal savings associations; the Federal Deposit Insurance Corporation—state non-member banks, state savings associations; and the Federal Reserve—parent BHCs, nonbank subsidiaries of BHCs, consolidated BHC, FHCs, SLHCs, and state member banks.

[294] Regulation Y, 12 CFR § 225.11 and 12. The Federal Reserve must consider many factors required by 12 CFR § 225.13, including the financial resources and managerial competence, experience and integrity of the officers, directors and principal (i.e. more than 10 per cent) shareholders of the acquiring company.

[295] 12 USC § 1844 (a) and (c) and Regulation Y, 12 CFR § 225.5 (a)–(c).

[296] Regulation Y, 12 CFR § 225.21–22. A list of permissible nonbanking activities is at 12 CFR § 225.28 (b).

[297] See BHC Manual 1050.0.1 and 1050.0.2 and Federal Reserve Letter SR 08-9/CA 08-12, dated 16 October 2008 entitled "Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations". Consolidated reporting for BHCs is required under Form FR Y-9C: see https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDal8cbqnRxZRg==.

[298] *Regulation Q Capital Adequacy of Bank Holding Companies, Savings and Loan Holding Companies, and State Member Banks*, 12 CFR 217, at: https://www.federalreserve.gov/bankinforeg/reglisting.htm#Y.

[299] 12 CFR § 1844 (b).

[300] For an overview of the licensing process of a BHC, see: https://www.federalreserve.gov/bankinforeg/afi/bhcfilings.htm. The process of licensing is laid down in Regulation Y, 12 CFR 225 Bank Holding Companies And Change In Bank Control.

practices or to address violations of law. Beyond, the consolidated capital standards for BHCs which the Federal Reserve has established, it imposed funding and liquidity requirements to prevent excessive leverage, sound risk management processes, exposure and intra-group transactional limits, stress testing, AML/CTF and ethical rules. Audit controls and dividend restrictions may moreover be imposed and a BHC that is able to do so may be ordered to assist a troubled or failing subsidiary bank. In addition, more stringent prudential financial standards as well as group recovery and resolution planning (including group liquidity arrangements) have been mandated for systemically important financial groups.[301]

To facilitate these regulatory and supervisory requirements, the Federal Reserve mandates BHCs to file a range of regulatory reports on a periodic basis (usually quarterly) covering such areas as: financial statements on a consolidated (and in some cases parent company only) basis; statements of condition and income; organisational structure and any changes; management information systems; foreign exposures group wide; risk-based capital and derivatives activity reports; and US entities controlled by foreign banking organisations.[302]

Driven by national treatment promoting competitive equality, the Fed also regulates and supervises the US operations of foreign banks with a presence in the US.[303]

The international impact of US BHC regulation and supervision

The BHC Manual states that the Federal Reserve's consolidated supervision program has served as a benchmark for the evolving international standards for the consolidated supervision of financial groups, as the Federal Reserve notes.[304]

Experience in the USA illustrates the need for strong, cooperative relationships among regulators and supervisors both within the USA and between the USA and foreign countries. In language which should resonate in other areas of multi-level governance, such as the EU and EA, and in Africa with its differing national and regional arrangements relating to banking supervision, the Manual emphasises the need in the USA for strong cooperative relationships among relevant regulators and supervisors across different domestic jurisdictions. Thus, the Manual states:

"Effective consolidated supervision requires strong, cooperative relationships between the Federal Reserve and relevant primary supervisors and functional regulators. These relationships respect the individual statutory authorities and responsibilities of the respective supervisors and regulators and provide for appropriate information flows and coordination so that individual responsibilities can be carried out effectively, while limiting the potential for duplication or undue burden. Information sharing among domestic and foreign supervisors, consistent with applicable laws and the jurisdiction of each supervisor, is essential to ensure that a banking organisation's global activities are supervised on a consolidated basis.

These concepts underlie the provisions of [the US legislation] … governing the interaction between the Federal Reserve, as consolidated supervisor, and the other primary supervisors or functional regulators that may be involved in supervising one or more subsidiaries of a BHC".[305]

[301] Sections 165(a) and (d) of the Dodd-Frank Act (12 USC § 5365) require that BHCs with total consolidated assets of $50 billion or more, and non-bank financial companies supervised by the Federal Reserve, should be subject to more stringent (enhanced) prudential requirements and should submit resolution plans (living wills) to the Federal Reserve and the FDIC, describing the company's strategy for orderly resolution in the event of material financial distress or failure. Currently, the most complex banking groups supervised by the Board are required to file resolution plans by July 1 of each year. Other affected companies are generally required to file by December 31 of each year.

[302] For forms to be submitted by BHCs, see: https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDal8cbqnRxZRc==.

[303] In the words of the BHC Manual: "In addition to its role as consolidated supervisor of BHCs, the Federal Reserve also is responsible for the overall supervision of the U.S. operations of foreign banks that have a banking presence in the United States. This role was established by the International Banking Act of 1978, which introduced a policy of national treatment promoting competitive equality between FBOs operating in the United States and domestic banking organisations. The Foreign Bank Supervision Enhancement Act of 1991 established uniform federal standards for entry, expansion, and supervision of FBOs in the United States and increased the Federal Reserve's supervisory responsibility and authority over the U.S. operations of FBOs. This Act also introduced the requirement that the Federal Reserve approve the establishment of all U.S. banking offices of foreign banks and, in that regard, take into account whether the foreign bank is subject to comprehensive, consolidated supervision by its home-country supervisor".

[304] In particular, the BHC Manual states: "Key concepts that have been part of the Federal Reserve's approach to consolidated supervision for many years are reflected in the Basel Committee on Banking Supervision's *Minimum Standards for Internationally Active Banks* (1992), capital accords (1988 and 2006), and *Core Principles for Effective Banking Supervision* (1997 and 2006), and are now used by the International Monetary Fund and the World Bank in connection with their assessments of countries' bank supervisory regimes".

[305] In some instances, if necessary, a regulatory agency other than the entity's primary supervisory authority will participate in a BHC examination or inspection in order to fulfil its regulatory responsibilities. The BHC Manual further states that the Federal Reserve assists relevant primary supervisors and functional regulators in performing their supervisory responsibilities with respect to regulated subsidiaries by sharing pertinent information relating to those subsidiaries.

European Union

Single Rulebook

Introduction A relative latecomer in banking regulation, the EU has a wide array of legislative instruments that regulate the banking industry from a prudential perspective. Some of these legal acts cross the boundary of the banking area but the "silo" approach to regulation of the three subsectors of the financial services sector (banking, securities and insurance) has remained, even after the Great Financial Crisis (GFC).[306] We give a summary description of the four elements of the Single Rulebook,[307] the set of rules adopted with a view to uniform banking regulation across the EU, with an emphasis on how they deal with BHCs. A description of the entities entrusted with ensuring harmonised application of these rules, the European Supervisory Authorities EBA,[308] ESMA[309] and EIOPA,[310] is beyond the scope of this article, as is more than a cursory indication of the newly assumed role of the ECB in directly supervising banks in the Euro Area, and of the SRB in directing the resolution of banking groups. Such powers are discussed here only in so far as relevant for our assessment of the treatment of BHCs in EU and EA regulation.

The capital requirements regulation The Capital Requirements Regulation (CRR)[311] lays down uniform[312] rules for the capital[313] and liquidity requirements[314] for banks,[315] as well as reporting and public disclosure rules. The CRR translates into EU law the norms issued by the Basel Committee on Banking Supervision (BCBS), albeit with variations.[316]

The CRR determines the level of application of supervisory requirements: solo, or consolidated. The general rule is that banks must comply with the capital requirements (Parts Two to Five of the CRR) and the disclosure requirements (Part Eight) on an individual basis (solo).[317] Article 11 CRR and Article 119 CRD IV are central provisions on the application of supervisory requirements to parent companies. The former specifies the general application of prudential consolidation while the latter stipulates that Member States are to include holding companies in consolidated supervision "where appropriate".

The Single Rulebook differentiates between various types of parent undertakings,[318] distinguishing between

306 Veerle Colaert, European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?, *Common Market Law Review* 52: 1579–1616, 2015.

307 Interactive access to the Single Rulebook can be found at EBA's website: http://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/-/interactive-single-rulebook/main_documents.

308 European Banking Authority, established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, Official Journal of the European Union (OJ), No. L 331/12, 15 December 2010, as amended by Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ No. L 287/5, 29 October 2013.

309 European Securities and Markets Authority, established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331/84, 15 December 2010, as amended; consolidated text at: https://www.esma.europa.eu/sites/default/files/library/2015/11/1095-2010_esma_regulation_amended.pdf.

310 European Insurance and Occupational Pensions Authority established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331/48, 15 December 2010.

311 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, corrigenda in the Official Journal of the European Union, No. L 321/6, 30 November 2013.

312 Article 1 CRR speaks of "uniform" rules, whereas Article 3 stipulates that banks may go beyond these uniform requirements, implying national legislators and supervisors may not vary the exigencies. Of course, supervisors have tools at their disposal to apply the general rules in an institution-specific manner, so as to target an appropriate level of coverage for risks an individual bank runs, notably under the Supervisory Review and Evaluation Process (SREP) of Articles 104 *ff.* CRD IV.

313 Both a Risk-Weighted Approach (RWA) and a leverage ratio; see Articles 101–386 and 429–430 CRR, respectively.

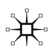
314 The CRR regulates own funds requirements for credit risk, market risk, operational risk and settlement risk, limits on large exposures, and liquidity requirements (Article 1 CRR).

315 "Credit institutions" in EU parlance. Investment institutions are also covered but not discussed here.

316 The BCBS reports on regulatory compliance with Basel III for all affiliated jurisdictions and has been very critical, in its Regulatory Consistency Assessment Programme (RCAP), of deviations adopted by the EU, labelling the implementation "materially non-compliant". See: Assessment of Basel III regulations—European Union, December 2014, at: https://www.bis.org/bcbs/publ/d300.pdf. For the BCBS's most recent assessment, see: *Eleventh Progress Report on adoption of the Basel regulatory framework*, October 2016, at: https://www.bis.org/bcbs/publ/d388.pdf.

317 Article 6(1) CRR. Articles 7-10 CRR contain waivers for the individual application of prudential requirements, resulting in consolidated application of solvency or liquidity requirements.

318 Defined in Article 4(1)(15) CRR with reference to Article 22 of the Accounting Directive (Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ No. L 182/19, 29 June



parents that are themselves active in the financial sector ("parent institutions"), and holding companies, while also distinguishing between parents established in the same Member State or elsewhere in the Union.

The material solvency, liquidity and disclosure requirements[319] for parent undertakings require a financial holding company[320] or a mixed financial holding company[321] in a Member State to comply with capital requirements and large exposures (Parts Two to Four) and leverage (Part Seven).[322]

We read this to imply that a parent holding company needs to ensure compliance with solvency requirements on a consolidated basis for the group it heads, on the basis of prudentially consolidated accounts. Others may approach the matter differently and stay closer to the wording of Article 11(2) CRR which refers to "institutions", i.e. banks and investment firms,[323] that need to comply with the requirements on a consolidated basis.[324] Even though this latter reading makes the supervised entity the addressee of the norm, the norm itself applies to the group, i.e. the parent and the entities other than the authorised bank. In line with the objective of the provision, which is to impose supervisory requirements on banking groups on a consolidated basis, with supervisory practice in certain Member States to formally include holding companies in the scope of prudential supervision,[325] and with corporate reality, where the parent of a group directs the business of the undertakings in the group, we are inclined to the view that the provision is directed at the parent holding and concerns the group, including non-licensed entities therein. As far as liquidity requirements (Part Six) are concerned, EU parent institutions, banks and investment firms controlled by an EU financial holding company, or by an EU mixed financial holding company, shall comply with these on a consolidated basis.[326] An EU financial holding company and an EU mixed financial holding company need[327] ("on the basis of the consolidated situation of that [mixed] financial holding company") to comply with the requirements on disclosure (Part Eight), with significant subsidiaries subject to individual (or sub-consolidated) disclosure requirements.[328]

Thus, the CRR requires a parent holding company not itself subject to supervision as a bank to comply with disclosure requirements on a consolidated basis, due to the authorised status of its subsidiaries.

We understand that supervisors directly address the holding company and engage with its management and staff as the accountable persons for compliance with consolidated supervision and disclosure that is enforced through its authorised subsidiary. This is in line with our reading of the rules.

The CRR specifies the *scope of prudential consolidation* and *supervisory cooperation* in respect of consolidated supervised entities and groups. Extensive cooperation by the competent authorities is prescribed,[329] with joint decision-making in respect of certain crucial issues preferred, notably the use of internal models for the calculation of the solvency requirements, and the treatment of intra-group liquidity flows. When joint decision-making cannot be

Footnote 318 continued
2013, as amended, consolidated text at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1425994405386&uri=CELEX:02013L0034-20141211). For certain prudential purposes, the term "parent undertaking" is understood wider than as defined in the Accounting Directive, namely as "any undertaking which effectively exercises dominant influence over another undertaking" (Article 4(1)(15)(b), in fine, CRR).

319 See, also recitals 35-38 of the preamble to the CRR on consolidation which specify that "own funds requirements apply on an individual and consolidated basis", and refer to the availability of capital in a group to protect savings where needed.

320 Pursuant to Article 4(1) (30) CRR a "parent financial holding company in a Member State" refers to a financial holding company in a Member State that is not a subsidiary of a bank or investment firm authorised in the same State, or a subsidiary of a holding company set up in this State, while under (31), the same provision identifies an "EU parent financial holding company" as a parent financial holding company that is not a subsidiary of a bank or investment firm authorised anywhere in the EU, or of a holding company set up anywhere in the EU.

321 Article 4(1)(21) refers to the FICOD Directive (2002/87, as amended) for the definition of a mixed financial holding company. Briefly, this is a parent undertaking of a financial conglomerate that itself is not a supervised financial sector company (bank, insurance undertaking, investment firm, asset management company, or alternative investment fund manager). The definition of a financial conglomerate includes a group with significant financial business that extends into both the banking and insurance sectors with a non-regulated entity at its head. See Article 2(14) and (15) of the FICO Directive, on which more below.

322 Article 11 (2) CRR.

323 Article 4(1)(3) CRR.

324 The language on prudential consolidation in Article 11 CRR leads the European Commission, in an answer on the website of the EBA (EBA Q&A 2013/521, at: http://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2013_521), to conclude that the authorised *institutions* need to abide by the requirements of consolidated supervision incumbent on the group, including their *parents*. Article 12 CRR may also be held against our reading of consolidated requirements applying to a group being imposed as norms on the group's parent. Article 12 specifies that where a holding company

Footnote 324 continued
owns a bank and an investment firm, the consolidated requirements apply to the bank. However, this provision may also be read as indicative of the preponderance of banking supervision (over that of investment firms) and, thus, need not be decisive in determining where the obligations lie. We read them as attached to the parent company.

325 Several Member States include BHCs directly in their prudential regulations, including France, Germany, Italy, Spain and Belgium.

326 Article 11(3) CRR.

327 Article 13(2) CRR.

328 There is an exception for EU parents that are part of third-country based group subject to equivalent disclosure requirements: Article 13(3) CRR.

329 Article 20 CRR.

achieved, the consolidating supervisor may take a decision, subject to possible EBA intervention, under its over-ride powers.[330] The CRR specifies the instances in which supervisors should strive for joint decision-making.

The CRR generally refers to CRD IV for the exercise of supervisory powers,[331] which are explored below.

CRD IV For the purposes of describing Europe's BHC regulation, several aspects of the Capital Requirements Directive[332] are relevant. "CRD" is a bit of a misnomer as this legal act also regulates access to the banking sector and governance of banks.[333] The relevant elements of CRD IV are the transparent group structure requirement, the assessment of the suitability of shareholders and the application of supervisory norms to BHCs.[334]

A transparent group structure is a requirement for the authorisation of a bank, as the preamble[335] and the material norm[336] make clear. The provision that sets out the internal governance requirements reiterates the transparency standard for groups.[337] In the licensing process, the assessment of the suitability of a qualifying holding[338] in a bank, defined as a direct or indirect holding representing 10% or more of capital or voting rights or which makes a significant influence over the management of the undertaking possible,[339] is based on five criteria. These are[340]: reputation of the acquirer; reputation and expertise of those in charge of the management of the bank as a result of the acquisition; financial soundness of the acquirer; continued ability to comply with prudential requirements, "including whether the group of which [the bank] will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among [supervisory] authorities and determine the allocation of responsibilities among [them]"; and Anti-Money Laundering and Countering Terrorist Financing (AML/CTF) considerations. These criteria emphasise the transparent group structure with a view to effective supervision over the whole and the constituent parts.

Supervisory norms are also addressed to the BHC, albeit—again—somewhat indirectly.

First, the institutional arrangements for supervision on a consolidated basis,[341] that we cannot discuss here any further, make clear that parent companies are included in the scope of the supervisory remit. Inclusion of [Mixed] Financial Holding Companies ([M]FHCs) in consolidated supervision is specifically prescribed.[342] Members of the management body of an [M]FHC need to comply with the same fit and proper criteria[343] that apply to directors of a bank. The provision on fit and proper testing of directors requires members of the management body to be "at all times of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties" and requires these members to fulfil further requirements of this provision.[344] These elaborate the "fit and proper" criterion and include commitment of sufficient time for the

[330] Article 19 of Regulation 1093/2010.

[331] "Article 2—Supervisory powers For the purposes of ensuring compliance with this Regulation, competent authorities shall have the powers and shall follow the procedures set out in [CRD IV]".

[332] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Official Journal of the European Union, No. L 176/338, 27 June 2013; *corrigendum* in Official Journal of the European Union No. L 208/73, 2 August 2013, and *addendum* in No. L 60/69, 28 February 2014.

[333] And investment firms, which we do not include here.

[334] Also relevant are provisions on attribution of powers among supervisors, supervisory cooperation and decision-making but such institutional aspects of consolidated supervision are outside the scope of our article.

[335] Recital 49 of the preamble to CRD IV: "Member States should be able to refuse or withdraw a credit institution's authorisation in the case of certain group structures considered inappropriate for carrying out banking activities, because such structures cannot be supervised effectively. In that respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions. (…)".

[336] Article 14(2) CRD IV: "The competent authorities shall refuse authorisation to commence the activity of a credit institution if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members, in particular where the criteria set out in Article 23(1) are not met. (…)".

[337] Article 74(1) CRD IV: "Institutions shall have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management". (Underlining added).

[338] Qualifying holdings need to be reported ahead of acquisition when certain thresholds are reached or exceeded: Article 22 CRD IV.

[339] Article 4 (1)(36) CRR.

[340] Article 23(1) CRD IV.

[341] Article 111–125 CRD IV.

[342] Article 119 (1), albeit only "where appropriate".

[343] Article 121 CRD IV, referring to Article 91(1) CRD IV.

[344] Article 91(2)–(8) CRD IV. The EBA and ESMA are currently consulting on guidelines on the assessment of the suitability of directors and senior management. See: draft Guidelines on the Assessment of the Suitability of the Members of Management Body and Key Function Holders, at: https://www.eba.europa.eu/documents/10180/1639842/Consultation+Paper+on+Joint+ESMA+EBA+Guidelines+on+suitability+of+management+body+%28EBA-CP-2016-17%29.pdf. The ECB is also currently consulting on guidance for the fit and proper assessment. See: Draft guide to fit and proper assessments, at https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/fap.en.html.

bank management function;[345] limits to the combination of executive and non-executive directorships;[346] adequate collective knowledge, skills and experience within the management body, thus allowing for specialisation among its members[347]; as well as ethical requirements: honesty, integrity and independence of mind.[348] Thus, the assessment of the suitability of managers extends to the holding company above a bank, and the requirements in respect of bank managers also apply to the management of the BHC. This is borne out by the EBA guidance on the assessment of the suitability of bank directors[349] to the competent authorities,[350] issued before the adoption of the CRD IV but with a view to its application once this element of Europe's Single Rulebook was in place[351]; it extends to the assessment of members of the management body of financial holding companies and mixed financial holding companies. In view of the differences between banks and holding companies, EBA specifies that such assessment is to be undertaken "in a proportionate way".[352]

Submission of holding companies to supervision is borne out by the provisions addressing the latter, including regarding information requirements and inspections,[353] to be effected directly or through their licensed subsidiaries, the "exercise [of] general supervision over transactions between [the bank] and … the … holding company",[354] and the inclusion of [mixed] financial holding companies and their managers among those to whom administrative measures may be applied and upon whom administrative penalties may be imposed[355] for breach of national laws implementing CRD IV.

The somewhat qualified and indirect approach to [M]FHCs in Europe becomes clear in the wording of the provision on the level of application of the adequacy of capital. The requirement of adequate internal capital[356] is to apply to a supervised bank on the basis of the consolidated situation of the [M]FHC, as per the provision on the level of application of the internal capital adequacy process.[357] This falls short of an outright application to the BHC itself, and seems to put the onus of compliance on the bank, rather than on its ultimate parent.

Financial Conglomerates Directive The Financial Conglomerates Directive (FICOD)[358] introduces supervision of financial conglomerates encompassing authorised banks and insurance companies. FICOD's focus is on potential risks of double gearing (multiple use of capital) and on "group risks", i.e. the risks of contagion, management complexity, risk concentration, and conflicts of interest.[359] Financial conglomerates are indicated loosely in the preamble of the EU directive as: "financial groups which provide services and products in different sectors of the financial markets",[360] and are more elaborately defined in the body of the legal act.[361] A central

[345] Article 91(2) CRD IV.

[346] Article 91(3)–(6) CRD IV.

[347] Article 91(7) CRD IV This provision alludes to the risks undertaken by the banking business: "The management body shall possess adequate collective knowledge, skills and experience to be able to understand the institution's activities, including the main risks".

[348] Article 91(8) CRD IV: "Each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making".

[349] EBA's *Guidelines on the assessment of the suitability of members of the management body and key function holders* (EBA/GL/2012/06), 22 November 2012, at: http://www.eba.europa.eu/regulation-and-policy/internal-governance/guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body-and-key-function-holders. A consultation is on-going on new draft guidelines on fit and proper assessment of directors; see the Joint ESMA and EBA Consultation Paper EBA/CP/2016/17, 28 October 2016, at: http://www.eba.europa.eu/documents/10180/1639842/Consultation+Paper+on+Joint+ESMA+EBA+Guidelines+on+suitability+of+management+body+%28EBA-CP-2016-17%29.pdf.

[350] Who will have to indicate their compliance with it or explain non-compliance.

[351] Therefore, references are to Directive 2006/48/EC, replaced by the CRD IV.

[352] Article 3 EBA Guidelines EBA/GL/2012/06: "(…) The role of holding companies differs from the role of credit institutions, therefore the process and the criteria for the assessment of the suitability should be applied in a proportionate way, taking into account the nature, scale and complexity of the financial holding company and the particular relationship of the member of the management body or key function holder with the credit institution. (…)" (Underlining added).

[353] Article 122 CRD IV. This provision addresses mixed-activity holding companies but we read it as evidence of the scope of supervision also of other holding companies that may be more directly supervised.

[354] Article 123 CRD IV. This provision addresses mixed-activity holding companies but we read it as evidence of the scope of supervision also of other holding companies that may be more directly supervised.

[355] Article 126 CRD IV.

[356] Article 73 CRD IV.

[357] Article 108 (3) CRD IV.

[358] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, OJ L 35/1, 11 February 2003, as amended, lastly by CRD IV; consolidated version (Document 02002L0087-20130717) available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002L0087-20130717.

[359] Quote from: http://ec.europa.eu/finance/financial-conglomerates/supervision/index_en.htm.

[360] Recital 2 of the preamble of Directive 2002/87, as amended (text already contained in original legal act).

[361] Article 2 (14).

concept is an MFHC,[362] i.e. a parent undertaking that is not a bank or investment firm (or otherwise an authorised undertaking) that, with its subsidiaries, of which at least one is a regulated entity, constitutes a financial conglomerate. A financial conglomerate is defined as a group whose activities mainly occur in the financial sector, with precise parameters applying for a group to be qualified as a financial conglomerate.[363]

Supplementary supervision aims at addressing loopholes in the EU's sectoral supervision approach.[364] When meeting certain thresholds, a financial conglomerate will be subject to supplementary supervision[365] so long as at least one regulated entity is a bank, and one other is an insurance undertaking. The material requirements for financial conglomerates relate to capital adequacy[366,367], risk concentration[368] and intra-group transactions.[369]

EBA, ESMA and EIOPA jointly issued guidelines to foster supervisory convergence on capital adequacy[370] and intra-group transactions.[371]

Bank Recovery and Resolution Directive Where the earlier legal acts in the area of prudential supervision are circumspect in their approach to [M]FHCs, the more recent enactments clearly include bank holding companies in their scope. The Bank Recovery and Resolution Directive (BRRD)[372] implements in Europe the 2011 Key Attributes of Effective Resolution Regimes for Financial Institutions, adopted by the Financial Stability Board (FSB), subsequently encapsulated in the 2014 Key Attributes.[373] The FSB's standards are intended for globally systemic financial institutions (G-SIFIs). The EU's Recovery and Resolution (R&R) regime applies to all banks and investment firms operating in Europe. The BRRD, in its scope[374] and definition[375] provisions, makes clear that it provides for recovery and resolution not only of authorised institutions (banks, investment firms), but also of parent undertakings, or other entities in a financial group and addresses group recovery and resolution.[376] The BRRD contains recovery planning requirements and introduces four resolution tools: the sale of business tool, the bridge institution tool, the asset separation tool, and the bail-in tool.[377] The

362 Point 15 of Article 2 of FICOD.

363 Point 14 of Article 2 of FICOD defines a financial conglomerate as a group with a regulated entity at the head or where at least one regulated entity is among the subsidiaries in the group and where

(i) *if there is a regulated entity at the head of the group*, this entity is a parent of, or holds a participation in, or has close links with, a financial sector entity//*if the entity at the head of the group is unregulated*, the group's activities **mainly** occur in the financial sector, meaning that more than 40% of the group's balance sheet total is in the financial sector, whether in a regulated or unregulated business;

(ii) at least one of the group entities is in the insurance sector and one is a bank or investment firm;

(iii) the consolidated activities of the insurance and banking or investment sector business are both **significant**, meaning that more than 10% of balance sheet total and of the solvency requirements of the financial sector entities in the group are within that particular segment (insurance versus banking/investment) of the financial sector, or the balance sheet total of the smallest financial sector in the group exceeds €6 billion. Detailed elements of this complex definition are disregarded here.

364 Recital 3 of the preamble to FICOD.

365 Article 2(14) of FICOD, in conjunction with Article 3.

366 Supervisory rules should "require regulated entities in a financial conglomerate to ensure that own funds are available at the level of the financial conglomerate which are always at least equal to the capital adequacy requirements as calculated in accordance with Annex I", Article 6(2) of FICOD. There may not be a negative difference between the own funds of the financial conglomerate calculated on a consolidated group basis and the own funds required at regulated entity level, i.e. the total capital of the financial conglomerate should at least be equal to that of the regulated entities together.

367 Annex II to FICOD. Multiple use of capital ("multiple gearing"), and inappropriate intra-group creation of own funds is to be avoided.

368 Article 7 of FICOD, and Annex II thereto. There should be regular (at least annual) reporting to the coordinator among the supervisors of significant risk concentration at group level; quantitative limits on group-level risk concentration may be set.

369 Article 8 of FICOD, as amended. These should, beyond a certain size, be notified regularly (at least annually) to the supervisor; quantitative or qualitative limits on intra-group transactions may be set.

370 See Commission Delegated Regulation (EU) No 342/2014 of 21 January 2014 supplementing [FICOD] and [CRR] with regard to regulatory technical standards for the application of the calculation methods of capital adequacy requirements for financial conglomerates, OJ L 100/1, 3 April 2014.

371 Commission Delegated Regulation (EU) 2015/2303 of 28 July 2015 supplementing [FICOD] with regard to regulatory technical standards specifying the definitions and coordinating the supplementary supervision of risk concentration and intra-group transactions, OJ L 326/36, 11 December 2015.

372 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173/190, 12 June 2014.

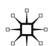
373 Key Attributes of Effective Resolution Regimes for Financial Institutions, at: http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf.

374 Article 1(1) BRRD which expressly includes financial holding companies and parents in its scope.

375 See, notably, Article 2(1) sub (6), (7), (9), (15), (31), (33), (42)–(46) (48) (49), (83)–(85) BRRD.

376 For a clear recognition of the power to apply the sale of business tool, the bridge institution tool or the asset separation tool to parents and group entities, see Article 34(4) BRRD, and Article 63 on the resolution powers that authorities need to have not only vis-à-vis authorised institutions but, also, in respect of group entities. See, also, the special title on **Cross-border group resolution**: Title V BRRD (Articles 87–92).

377 Article 37(3) BRRD.



BRRD introduces group recovery plans,[378] group resolution plans,[379] and group financial support,[380] all evidence of the inclusion of the group's parent institution being directly addressed. The BRRD's *General principles of resolution tools*[381] encompass the resolution of financial holding companies. The BRRD requires parent institutions to comply with the minimum requirement of own funds and eligible liabilities on a consolidated basis.[382]

Euro Area regulation

Introduction The introduction of prudential supervision, and resolution, at Union level, i.e. the establishment of "banking union" in the Euro Area, was born out of the need to sever the pernicious link between sovereign and bank debt. During the GFC and the subsequent Euro Area crisis, the entwinement of banks and sovereigns turned out to be toxic: banks whose assets included a high level of State government bonds that were diminishing in value because of the dire state of these sovereigns' finances, needed to be bailed-out by these very States, further undermining the sustainability of the latter's budgets. Taking responsibility for supervision and resolution[383] away from the State, and organising it at Union level, would allow for decisions unfettered by national preference or State-specific considerations. Banking union would thus help restore the financial stability of the Euro Area.

Specific to our subject, the legal acts adopted to activate the ECB's prudential powers and to establish a resolution regime for Euro Area banks address [M]FHCs and include these in the scope of the new regulatory powers for the ECB and the SRB.

SSM regulation The introduction of "banking union" entails the attribution to the ECB of micro-prudential powers.[384] The European legislator created a Single Supervisory Mechanism (SSM) of the ECB and National Competent Authorities (NCAs, the national supervisory authorities) in which the ECB plays a leading role[385] as it is responsible for the effective and consistent functioning of the SSM,[386] has regulatory powers and can give instructions to national supervisory authorities.[387] The ECB's direct supervisory powers[388] range from licensing[389] via information and inspection[390] to the imposition of sanctions.[391]

For the exact attribution of supervisory competences between the ECB and NCAs a distinction is applied between banks in size and systemic relevance. The largest banks (and bank holding companies)[392] are subject to full, direct ECB supervision. Banks (and BHCs) considered less significant are directly supervised by the NCAs.[393] In respect of "significant banks" and their parents, the ECB has taken over as competent authority in respect of all provisions of the Single Rulebook that entail supervisory powers.[394,395]

When setting out the ECB's supervisory powers, the SSM Regulation[396] includes FHCs and [M]FHCs as

[378] Article 7 BRRD: parent undertakings are to draw up, and submit to the consolidating supervisor, group recovery plans.

[379] On the basis of information submitted by the parent undertaking (Article 13 BRRD), group-level resolution authorities are to draw up group resolution plans (Article 12 BRRD).

[380] Group financial support arrangements that meet the conditions for early intervention (Article 27 BRRD) may be established (Article 19 BRRD), reviewed by the supervisory authorities (Article 20 BRRD), approved by shareholders (Article 21 BRRD) and shared with the resolution authorities (Article 22 BRRD). Such arrangements need to comply with free markets imperatives, and with micro-prudential and financial stability concerns (Article 23 BRRD). Supervisors may oppose (Article 25 BRRD) the decision to actually grant group financial support (Article 24 BRRD). The existence of group financial support arrangements is to be disclosed (Article 26 BRRD), applying the disclosure regime of the CRR (Articles 431–434 CRR).

[381] Set out in Article 37 BRRD.

[382] Article 45(8) BRRD.

[383] Whereas the effective date of the SSM was 4 November 2014, Union-wide resolution of significant banks has become operational as of 1 January 2016.

[384] Activating the enabling clause that had been available since the transition to monetary union: Article 127(6) TFEU.

[385] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013, hereafter: SSM Regulation. The detailed arrangements are laid down in an ECB legal act: Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141/1, 14 May 2014.

[386] Article 6(1) SSM Regulation.

[387] Article 6(5) SSM Regulation.

[388] Articles 9–18 SSM Regulation.

[389] In respect of all banks in the Euro Area, the ECB has become the "competent authority" for purposes of authorisation and withdrawal of authorisation and for the assessment of shareholders as fit and proper: Articles 14–15 SSM Regulation.

[390] Articles 10–13 SSM Regulation.

[391] Article 18 SSM Regulation.

[392] "Significant supervised entities" in the language used in the SSM Framework Regulation.

[393] See Article 6(4) SSM Regulation for the exact scope of supervisory powers.

[394] Articles 8–10 and 18 of the SSM Framework Regulation specify this take-over of the role by the ECB.

[395] EU legislation adopted after the establishment of "banking union" refers to the ECB as the competent authority. See, e.g. Articles 2 sub (21) and 4(10) BRRD.

[396] In Article 16(1). Admittedly, paragraph 2 of this article, which mentions powers the ECB can exercise "in particular", refers to "institutions", a term which the SSM Regulation does not define but which the CRR, in Article 4(1)(3), defines as a credit institution or an investment firm. Because of the clear language of the first paragraph addressing [M]FHCs, we do not read this as limiting the powers the ECB can exercise as addressed to authorised subsidiaries only.

addressees, next to credit institutions. This contrasts with CRD IV, where express mention of BHCs as addressees of supervisory powers is absent. The advent of banking union, therefore, is a clear indication of the inclusion of [M]FHCs in supervisory scope, albeit in the Euro Area only.[397]

SRM Regulation In a similar way, in the second element of "banking union", the Single Resolution Mechanism (SRM) has transferred competences from State to Union level.[398] As with the SSM, significant banks and holdings are subject to resolution power at Union level, to be exercised by the SRB. The preamble to the SRM Regulation makes clear that resolution of groups is envisaged.[399] The SRB and the two EU institutions involved in the application of resolution powers, replace the National resolution Authorities (NRAs) in *decision-making*,[400] while NRAs continue to *implement* any resolutions.

The SRM Regulation "establishes uniform rules and a uniform procedure for the resolution of the entities referred to in Article 2 that are established in the [Euro Area Member States]". Article 2 mentions credit institutions and "parent undertakings, including financial holding companies and mixed financial holding companies" that are subject to the ECB's consolidated supervision[401] as the entities to which the SRB's resolution powers apply.

Thus, it is clear that [M]FHCs are subject to the resolution powers of the SRB. Where the BRRD attributes competences to NRAs, the SRM Regulation[402] confers these on the SRB. The SRB is to be responsible for the resolution of significant groups, and of other cross-border groups.[403] Group resolution plans need to be established under the aegis of the SRB that specify "how critical functions and core business lines could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity upon the failure of the institution".[404] The SRB is competent to establish minimum requirements for own funds and eligible liabilities (MREL) which banks and groups must meet at all times.[405] These MREL should be able to cover losses of the ultimate parent holding and all consolidated entities within the group if "bail-in" tools were used.[406] Parent institutions are to comply with MREL on a consolidated basis.[407]

Prior to any actual resolution, if need be, draft resolution plans are to be drawn up,[408] by the SRB in respect of significant banks and groups,[409] possibly with input from the entity concerned.[410] Such plans need to "[demonstrate] how critical functions and core business lines could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity upon the failure of the institution".[411] A group resolution plan needs to assess "the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to group entities established in the Union, including measures to facilitate the purchase by a third party of the group as a whole".[412] Like all resolution planning, likely impediments for resolution need to be identified beforehand and removed.[413] Should the reduction or removal of impediments to resolvability be insufficient in the eyes of the SRB, an array of measures may be imposed.[414] The

[397] The Euro Area comprises nineteen out of the currently 28 EU Member States: Germany, France, Italy, Spain, the Netherlands, Belgium, Luxembourg, Portugal, Greece, Ireland, Finland, Austria, Slovenia, Slovakia, Estonia, Latvia, Lithuania, Cyprus and Malta.

[398] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1, 30 July 2014.

[399] Recital 30 states: "The Board should act independently. It should have the capacity to deal with large groups and to act swiftly and impartially.…" (Underlining added).

[400] As recital 42 of the preamble to SRM Regulation states: "The [SRB], the Council where relevant, and the Commission should replace the national resolution authorities designated under [the BRRD] in respect of all aspects relating to the resolution decision-making process".

[401] Pursuant to Article 4(1)(g) of the SSM Regulation.

[402] in Article 5(1): "the [SRB] shall, for the application of [the SRM Regulation and the BRRD], be considered to be the relevant national resolution authority or, in the event of cross-border group resolution, the relevant group-level resolution authority".

[403] Article 7(2)(a) and (b) SRM Regulation.

[404] Article 8(9)(c), in conjunction with Article 8(10) and (11) SRM Regulation.

[405] Article 12 SRM Regulation. The level of MREL has been established EU-wide by Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities, OJ L 237/1, 3 September 2016.

[406] Article 12(6) SRM Regulation.

[407] Article 12(8) SRM Regulation.

[408] Either by the SRB (Article 8 SRM Regulation) or by NRAs (Article 9).

[409] Article 8 SRM Regulation.

[410] Article 8(8) SRM Regulation.

[411] Article 8(9)(a) SRM Regulation.

[412] Article 9(11)(b) SRM Regulation.

[413] Article 9(11)(b) and 10 SRM Regulation.

[414] Article 10(11)(a), (b), (d), (e) and (f) SRM Regulation. Such measures include requiring an entity "to revise any intragroup financing agreements or review the absence thereof", limitations to "maximum individual and aggregate exposures", divesting of specific assets, limitation of cessation of specific existing or proposed activities, restricting or preventing the development of new or existing business lines, or the sale of new or existing products.

SRB may even require "changes to the legal or operational structures of the entity or any group entity, either directly or indirectly under their control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools", or the setting up of "a parent financial holding company in a Member State or a Union parent financial holding company".[415]

This somewhat extensive discussion of resolution powers is included here to show that parent undertakings and [M]FHCs may be subject to resolution and, in order to establish resolvability and plan ahead for any possible resolution, to wide-ranging requirements, including imposed group structure changes, restriction of business and required issuance of liabilities that can be "bailed in".

African regional developments

Without going into detail, three regional developments merit mentioning in BHC regulation context. They concern the developments toward harmonised banking regulations in the Southern Africa Development Community (SADC) and in the East African Union (EAU), and the recent adoption of a uniform prudential framework in West Africa's CFA-centred monetary union (*UMOA*).

UMOA

The West African Monetary Union[416] recently adopted new prudential norms for banks and BHCs. Its Council of Ministers adopted the new regime on 24 June 2016[417] and the *Banque Centrale des États de l'Afrique de l'Ouest* (BCEAO)[418] issued a notice[419] on 23 August 2016 whose Annex[420] sets these out. Titles I to X of the *UMOA prudential framework* implement Basel II and III, with risk-weighted capital ratios for credit risk, operational risk and market risk,[421] as well as a leverage ratio.[422] Title XI contains the main features of prudential supervision—Internal Capital Adequacy Assessment Process (ICAAP) and Supervisory Review and Evaluation Process (SREP)—and supervisory interventions, while Title XII relates to market discipline (the third Pillar of Basel). The new regulations, which BCEAO instructions and *Commission Bancaire* (Banking Commission)[423] circulars may give precision to, are to enter into force on 1 January 2018, and contain transitional provisions for adaptation of the institutions subject to the norms. The opening sentence of the Annex already mentions cross-border banking groups as one feature of recent developments that necessitated the recast of prudential norms. Based on Article 56 of the uniform law on banking regulation,[424] which makes the *UMOA* Council of Ministers competent to issue West African banking regulations and the *BCEAO*'s *Commission Bancaire* to adopt implementing rules that may differentiate among banking entities, this prudential framework aims to bring the WAMU standards in line with international norms, while giving due consideration of the specificities of the regional economy and banking system.

The new prudential framework applies to banks and, on a consolidated basis, to BHCs. These "financial institutions" are either financial holding companies (entities not licensed as credit institutions that are the parent of a banking group) or intermediary financial holding companies (entities not licensed as credit institutions that hold participations in the banking business in the *UMOA*).[425] We read this to imply that cross-border banking groups from outside the region need to establish a regional parent. Banking groups are defined as a preponderant[426] financial sector group whose banking activities are more important than those in insurance or other financial sector business. Consolidated supervision applies to the (intermediate)

415 Article 10(11)(g) SRM Regulation. See the earlier discussion of the transparent group structure requirement.

416 In French: *Union Monétaire Ouest Africaine (UMOA)*. This group of francophone West African States which already share a single currency the CFA franc, linked to the euro (655,957 FCFA = 1 euro) comprises Benin, Burkina, Côte d'Ivoire, Guinea-Bissau, Senegal, Mali, Niger and Togo.

417 *Communiqué de presse de la réunion ordinaire du Conseil des Ministres de l'Union Economique et Monétaire Ouest Africaine (UEMOA) tenue à Lomé, les 24 et 25 juin 2016*, at: http://www.bceao.int/Communique-de-presse-de-la-reunion-ordinaire-du-Conseil-des-Ministres-de-l.html.

418 See: http://www.bceao.int/-BCEAO-.html.

419 *Avis No. 004-08-2016 relatif aux dispositif prudentiel applicable aux établissements de crédit et aux compagnies financières de l'Union Monétaire Ouest Africaine (UMO*A).

420 *Dispositif Prudentiel applicable aux Etablissements de Credit et aux Compagnies Financieres de l'union Monétaire Ouest Africaine*; hereafter: *UMOA prudential framework*.

421 The *UMOA prudential framework* specifies in Table 22 that an 8% minimal solvency ratio and a 0.625% capital conservation buffer are to be increased from 2018 to 2022 to 9 and 2.5% respectively.

422 Of at least 3%, variable by the supervisory authority for credit institutions according to their risk specificities: Paragraph 469 of the *UMOA prudential framework*.

423 The *Commission Bancaire* is the supervisory authority in the West African Monetary Union. It was established by a Convention signed among the UMOA States in Ouagadougou on 24 April 1990, replaced by a Convention signed in Lomé on 20 January 2007. See: www.bceao.int.

424 *Loi uniforme portant réglementation bancaire*, at: http://www.bceao.int/IMG/pdf/loi.pdf.

425 Paragraph 1(d) of the *UMOA prudential framework*.

426 At least 40% of the balance total of a group should be from the financial sector for it to qualify as a banking group: paragraph 1(a) and (k) of the *UMOA prudential framework*.

financial holding companies of a banking group.[427] In case of non-compliance with the norms enunciated in the *UMOA prudential framework*, the *Commission Bancaire* can issue injunctions to the bank or BHC to redress the deviation within a fixed period of time.[428] Own funds requirements and resolution rules apply to individual credit institutions[429] and on a consolidated basis.[430] The additional supervisory measures (ICAAP and SREP) apply on a consolidated basis to BHCs.[431]

SADC

The Southern African Development Community (SADC) which brings together 15 African countries[432] is devoted to regional integration and eradicating poverty.[433] Its legal bases are a Treaty[434] and, at present, 27 Protocols ranging from health to free movement of persons to finance and investment.[435] The latter Protocol prescribes "co-operating on bank supervision amongst Central Banks" and, in Annex 8, sets the following objectives: "(a) promote in each Member State, an efficient and effective banking regulatory and supervisory system based on internationally accepted principles; (b) establish a regional banking regulatory and supervisory strategy; (c) promote the identification, measurement and management of banking risks, including systemic risks; and (d) promote harmonization of banking regulatory and supervisory matters, policies, practices, rules and procedures across the Region.[436]" "[A] legal framework that is supportive of modern banking regulatory and supervisory practices" is to be established.[437] The legal texts refer to international best practices and include definitions from the BIS. The Committee of Central Bank Governors in SADC (CCBG),[438] through the SADC Subcommittee of Banking Supervisors, is entrusted with carrying out this and other tasks. While aware of developments toward prudential harmonisation, also in respect of BHCs, we were unable to access public documents.

EAC

In the context of its development toward monetary union,[439] the East African Community (EAC) has set itself the task to "adopt common principles and rules for the regulation and prudential supervision of the financial system".[440] The EAC[441] comprises Kenya, Tanzania, Uganda, Rwanda and Burundi; in April 2016, South Sudan acceded to the EAC Treaty. Harmonising prudential rules relating to the banking industry,[442] i.e. "moving towards legal and regulatory harmonisation against the international standards known as the Basel Core Principles (BCPs)" is regarded as "critical to achieve an effective functioning of a single market in banking services" on the EAC's website.[443] We have not been able to identify harmonised rules in this area, as yet, and note that, at a recent conference on monetary union in Arusha "participants noted still high compliance cost in light of different regulations in member countries".[444] The apparent absence of harmonised rules explains our focus on Kenya in this article. We submit that

[427] Paragraph 2 of the *UMOA prudential framework.* Paragraph 9 specifies the perimeter of consolidated supervision.

[428] Paragraph 3 of the *UMOA prudential framework.* During this time, dividends, share buy-backs or discretionary bonuses are prohibited.

[429] Paragraphs 14–58 of the *UMOA prudential framework.* See Paragraph 60.

[430] Paragraphs 62–85 of the *UMOA prudential framework.* See Paragraph 61.

[431] Paragraph 512 of the *UMOA prudential framework.*

[432] Comprising Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Note that Tanzania is a member of both SADC and the EAC. The fact that Tanzania is present in both regional organisations makes it ideally placed to propose that the BHC regulations in both of these regions should be identical, or at least in harmony.

[433] See: http://www.sadc.int/.

[434] *Consolidated Treaty of the South African Development Community*, at: http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf.

[435] Protocol on Finance and Investment, Maseru (Lesotho), 18 August 2006, at: http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf.

[436] Article 2(1) of Annex 8 to the SADC Protocol on Finance and Investment: *Cooperation and Co-Ordination in the Area of Banking Regulatory and Supervisory Matters.*

[437] Article 4(1)(d) Annex 8 to the SADC Protocol on Finance and Investment: *Cooperation and Co-Ordination in the Area of Banking Regulatory and Supervisory Matters.*

[438] See: https://www.sadcbankers.org/Pages/default.aspx.

[439] See the *Protocol on the Establishment of the East African Monetary Union*, 30 November 2013, at: http://www.eac.int/sites/default/files/docs/protocol_eac_monetary-union.pdf.

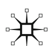
[440] As stated in the section on the EAC in the Report for the International Law Association (ILA)'s 77th biennial conference in Johannesburg, August 2016, submitted by the ILA's Committee on International Monetary Law (MOCOMILA), written by Professor Agasha Mugasha, whose research we consulted when writing these lines.

[441] See: http://www.eac.int/. The EAC's motto is: One People, One Destiny.

[442] Article 14(4) of the *Protocol on the Establishment of the East African Monetary Union* lists the subsectors of the financial sector in respect of which regulatory harmonisation is to be effected.

[443] See: http://www.eac.int/sectors/financial/banking.

[444] EAC, EU and IMF conference on "Regional Integration in the EAC: Making the Most of the Common Market on the Road to a Monetary Union", Arusha, Tanzania, 31 October–1 November 2016, see: http://www.eac.int/news-and-media/press-releases/20161101/arusha-conference-calls-further-integration-and-reforms-eac-road-monetary-union.



harmonisation of prudential rules for banking in East Africa would benefit from comparative legal perspectives across the boundaries of East Africa, to align African regional public banking law.

Concluding remarks: a call for Pan-African regulation

Our research into BHC regulation in Africa has revealed the advanced state of development in three jurisdictions which extensively regulate holding companies and subject parents of banking groups directly to an array of prudential rules of extensive and often intrusive consolidated supervision. These African jurisdictions compare favourably to their northern neighbour as, in the EU and the EA, the extent of direct supervision of bank holding companies is not as clear from the legislation, with State practices varying in their approach to BHCs. Our interpretation on (M)FHCs as direct addressees of EU/EA prudential norms is not the ruling paradigm.

Even though there are areas where further improvements are called for, and while admitting that we have not been able to research actual implementation on the ground, we consider that these three African jurisdictions provide state-of-the-art regulation. The developments in other AU jurisdictions, notably the West African Monetary Union, point toward an alignment of regulatory norms for banking groups across Africa which, we submit, could be the basis for ultimate pan-African regulation. We recommend that a sustained effort should now be undertaken to strengthen and build a Pan-African regulatory environment in which BHCs could be subject to unified or, at least, harmonised regulation throughout Africa. As an intermediate step, regional BHC regulatory regimes could be further strengthened.

To our minds, now is the time to undertake such efforts, with three jurisdictions having set a range of remarkable common standards and before those standards become so entrenched as to be difficult to amend. We suggest that existing African banking supervisory cooperation could be built upon to launch an effort to produce model draft laws or guidelines governing BHCs (drawing upon recent African national, and regional, efforts and incorporating internationally accepted FSB and BCBS guidelines) that would strengthen, harmonise and better serve the interests of banks and their stakeholders, foremost their customers, supervisory agencies and the African financial system. If our suggestions are implemented, we believe that they could make a lasting contribution to the effective development and well-being of Africa as a whole.

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